TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED [redacted]

[redacted] 1923

No. [redacted]19

THE CHICAGO, ROCK ISLAND AND PACIFIC [redacted]
COMPANY, PLAINTIFF IN ERROR,

vs.

DANIEL J. PERRY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [redacted]

[redacted]

(27,241)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 157.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

DANIEL J. PERRY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 6, 1920.

a *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, Oklahoma, this the 16th day of July, A. D. 1919.

[Seal Supreme Court, State of Oklahoma.]

——, ——,
Clerk Supreme Court of Oklahoma,
By REUEL HASKELL, Jr.,
Deputy.

1 [Stamped:] Filed in Supreme Court of Oklahoma Jul- 12, 1919. William M. Franklin, Clerk.

In the Supreme Court of the United States.

No. —.

Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error,

vs.

Daniel J. Perry, Defendant in Error.

Citation.

United States of America, *ss:*

The President of the United States to Daniel J. Perry, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein Jacob M. Dickinson Receiver for The Chicago, Rock Island and Pacific Railway Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma, this 11" day of July, 1919.

THOS. H. OWEN,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

2 We, the undersigned, attorneys of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation and enter an appearance for said defendant in error in the Supreme Court of the United States.
July 11, 1919.

EVEREST, VAUGHT & BREWER,
Attorneys for Daniel J. Perry, Defendant in Error.

3 [Stamped:] Filed in Supreme Court of Oklahoma Jul. 11, 1919. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 9118.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma.

To the Honorable Thos. H. Owen, Chief Justice of the Supreme Court of the State of Oklahoma:

The petition of The Chicago, Rock Island and Pacific Railway Company by C. O. Blake and R. J. Roberts, its attorneys, hereby sets forth:

That on May 27, 1919, the Supreme Court of the State of Oklahoma made and entered its final order and judgment herein in favor of Daniel J. Perry, in which final order and judgment, and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of your petitioner.

That heretofore, to-wit, on the 21st day of September, 1916, there was tried in the District Court of Oklahoma County, State of Oklahoma, a case in which Daniel J. Perry was plaintiff and Jacob M. Dickinson, as Receiver of The Chicago, Rock Island and Pacific Railway Company, was defendant.

The complaint in said cause was a petition for recovery of damages by reason of the issuance and delivery to plaintiff of an alleged false service letter dated August 18, 1915, Haileyville, Oklahoma, signed by H. F. Reddig, Superintendent, in violation of the
4 provisions of a statute of the State of Oklahoma, the same being Chapter 53, Art. 3 of the Session Laws of the State of Oklahoma for 1907 and 1908, page 516, approved April 24, 1908 (Revised Laws of Oklahoma, Annotated, 1910, Sec. 3769).

The defendant answered in said cause, putting in issue plaintiff's allegations of the said false service letter and setting up the unconstitutionality of the service letter statute, citation to which has just been given.

At the trial of said cause and after the introduction of all the evidence in the case, the defendant, Receiver, moved the court to direct the jury to return a verdict for the defendant Receiver, and requested in writing the court to give the following instruction:

"No. 4. You are instructed that you will allow the plaintiff no damages by reason of the issuance to him of a false service letter in violation of the statute of Oklahoma requiring said issuance of a service letter, for the reason that the statute of the State of Oklahoma is in violation of the Constitution of the United States and the Fourteenth Amendment thereof, and denies to this defendant due process of law and the equal protection of the law" (93).

This instruction was refused by the trial court and an exception allowed to the defendant to such refusal.

A verdict was returned for the plaintiff on said 21st day of September, 1916, in the sum of Three thousand ($3,000.00) dollars. The defendant Receiver thereupon moved the court to grant a new trial, assigning as grounds therefor—the court's refusal to give defendant's requested instruction No. 4, set out in exact language in this petition, and urging the additional grounds that there was no evidence to support the verdict and that the verdict was contrary to law, in addition to the ground that errors of law occurred at the trial, which were duly excepted to by the defendant, which
5 would justify the granting of a new trial to the defendant. Said motion for a new trial was overruled, to which the defendant Receiver excepted. Judgment was entered for the plaintiff upon the verdict of the jury.

The motion for a directed verdict and the motion for a new trial, upon the grounds hereinbefore set out, present a Federal question in said case, namely, that the service letter statute of Oklahoma, being Chap. 53, Art. 3 of the Session Laws of Oklahoma for 1907-08, page 516 (Revised Laws of Okla., Anno. 1910, Sec. 3769), providing:

"3769. Corporation to give letter to employee leaving service. Whenever any employee of any public service corporation, or of a contractor, who works for such corporation, doing business in this State, shall be discharged or voluntarily quits the service of such employer, it shall be the duty of the superintendent or manager,

or contractor, upon request of such employee to issue to such employee a letter setting forth the nature of the service rendered by such employee to such corporation or contractor and the duration thereof, and truly stating the cause for which such employee was discharged from or quit such service; and, if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employee, when so requested, or shall wilfully or negligently refuse or fail to state the facts correctly, such superintendent, manager or contractor shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the county jail for a period of not less than one month and not exceeding one year: Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employee. No printed blank shall be used, and if such letter be written upon a typewriter, it shall be signed with pen and black ink and immediately beneath such signature shall be affixed the official stamp, or seal, of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters used, upon such piece of paper, except such as are plainly essential, either in the date line, address, the body of the letter or the signature and seal or stamp thereafter, and no such letter shall have any picture, imprint, character, design, device, impression or mark, either in the body thereof or upon the face or back thereof, and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above prescribed."

6 and the action of the court in giving effect to said statute of Oklahoma were repugnant to the Fourteenth Amendment to the Constitution of the United States by denying to the Receiver defendant the equal protection of the laws and depriving him, as such, of property without due process of law.

That the Receiver defendant presented said questions to the Supreme Court of the State of Oklahoma by petition and summons in error and said Supreme Court of the State of Oklahoma on the 27th day of May, 1919, rendered its final judgment affirming the decision and judgment of the trial court.

That prior to the decision of said cause in the Supreme Court of the State of Oklahoma, the said court, upon application and showing of interest, entered an order permitting this petitioner to prosecute said proceeding in error.

Petitioner further shows that the said judgment of said Supreme Court was and is a final judgment of the highest court of said State, in which a decision in said cause may be had and that said Supreme Court of the State of Oklahoma, in affirming the said judgment, held:

"This legislation, we think, is a warranted and lawful exercise of the police power of the state. The police power of the state was not surrendered with the adoption of the federal constitution nor

taken from the states by the ratification of the fourteenth amendment. This power, though not precisely defined, includes the right to legislate on any matters pertaining to the health, safety and welfare of the public."

and also held:

"We think that the legislation attacked does not deny to the defendant due process of law; that it does not constitute an illegal infringement upon the right to contract, and that it is within the police power of the state."

and again:

"We believe that the better reasoning favors the sustaining of this and similar legislation. We agree with the supreme court of Missouri in the case of Cheek v. Prudential Ins. Co., supra, and we feel that the conclusion we have reached is in line with the decisions recognizing the necessity for the protection of the laborers."

7 The petitioner further shows that a Federal question was made in said cause, as herein set out, and said judgment of said Supreme Court was repugnant to the Fourteenth Amendment to the Constitution of the United States in that it gave effect to the statute requiring the giving of a service letter, truly stating the cause of the discharge or termination of the service and denied to this petitioner Federal rights guaranteed to it under the Constitution of the United States and the Fourteenth Amendment thereto.

Wherefore, petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to this court; for such other and further process as will enable your petitioner to obtain a review of the case, and a correction of the said error by the said Supreme Court of the United States, and also that an order be made fixing the amount of security which said plaintiff in error shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

C. O. BLAKE,
R. J. ROBERTS,
RAYMOND TOLBERT,
Attorneys for Plaintiff in Error.

8 [Stamped:] Filed in Supreme Court of Oklahoma Jul- 11, 1919. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 9118.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error in the above entitled cause and avers and shows to the court that in the record and proceedings in said cause the Supreme Court of the State of Oklahoma erred, to the grievous injury and wrong of the plaintiff in error herein and to the prejudice and against the substantial rights of the plaintiff in error herein, in the following particulars to-wit:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County, Oklahoma, which entered a judgment in favor of the plaintiff (defendant in error) in said cause in said court.

2. The Supreme Court of the State of Oklahoma erred in affirming the action of the District Court of Oklahoma County in said case in overruling the motion for a new trial filed therein by Dickinson, Receiver for The Chicago, Rock Island and Pacific Railway Company, for whom this plaintiff in error was substituted as the real party in interest later by the Supreme Court of the State of Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Oklahoma County, Oklahoma, which gave effect to an act entitled "An act relating to the employees of corporations and contractors; and prescribing the duties of the employer at the termination of the service, requiring a letter of discharge, and providing penalties for violation
9 hereof," the same being Chap. 53, Art. 3 of the Session Laws of the State of Oklahoma for the years 1907-08 found at page 516, approved April 24, 1908 (Revised Laws of Oklahoma, annotated, 1910, Sec. 3769).

4. The Supreme Court of the State of Oklahoma erred in holding that the provisions of said Chap. 53, Art. 3 of the Session Laws of the State of Oklahoma for the years 1907-08, page 516, are not in conflict with and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, for that the State of Oklahoma by and through the provisions of said Chap. 53,

assumes and seeks (*a*) to deprive the plaintiff in error of rights, privileges and immunities secured to it, (*b*) to deprive the plaintiff in error of property without due process of law, (*c*) to deprive and to deny to the plaintiff in error, within the jurisdiction of the State of Oklahoma, the equal protection of the law.

5. The Supreme Court of the State of Oklahoma erred in holding that by the provisions of said Chap. 53, Art. 3 of said Session Laws of Oklahoma for the years 1907-08, page 516, the plaintiff in error is not deprived of rights, privileges and immunities secured to it by the Federal Constitution and laws of the United States.

6. The Supreme Court of the State of Oklahoma erred in holding that by the provisions of said Chap. 53, Art. 3 of the Session Laws of Oklahoma for the years 1907-08, page 516, the plaintiff in error is not deprived of property without due process of law.

7. The Supreme Court of the State of Oklahoma erred in holding that by the provisions of said Chap. 53, Art. 3 of the Session Laws of Oklahoma for the years 1907-08, page 516, do not deny to the plaintiff in error the equal protection of the law.

8. The Supreme Court of the State of Oklahoma erred in holding that the said Chap. 53, Art. 3 of the Session Laws of Oklahoma for the years 1907-08, page 516, and the authority to be exercised thereunder, is within the police powers of the Legislature of the State of Oklahoma.

9. The Supreme Court of the State of Oklahoma erred in affirming the action of the trial court in refusing to give to the jury defendant's requested instruction No. 4, which said instruction is in words and figures as follows:

No. 4. "You are instructed that you will allow the plaintiff no damages by reason of the issuance to him of a false service letter in violation of the statute of Oklahoma requiring said issuance of a service letter, for the reason that the statute of the State of Oklahoma is in violation of the Constitution of the United States and the Fourteenth Amendment thereof, and denies to this defendant due process of law and the equal protection of the law." (93)

10. The Supreme Court of the State of Oklahoma erred in holding that the said Chap. 53, Art. 3 of the Session Laws of Oklahoma for the years 1907-08, page 516, did not constitute an illegal infringement upon the right to contract but that the same was within the police power of the state.

Wherefore, for these and other manifest errors appearing in the record, the said The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of the State of Oklahoma be reversed, set aside and held for naught and that judgment be rendered for plaintiff in error grant-

ing it its rights and immunities under the statutes and laws of the United States, and plaintiff in error also prays judgment for its costs.

C. O. BLAKE,
R. J. ROBERTS,
RAYMOND TOLBERT,
Attorneys for The Chicago, Rock Island and Pacific Railway Co.

11 We, the undersigned, as attorneys for Daniel J. Perry, hereby acknowledge service and the receipt of a copy of the Petition for Writ of Error and Assignment of Errors in connection therewith in Case 9118, Dickinson Receiver of C. R. I. and P. Ry. Co. against Daniel J. Perry in the Supreme Court of the State of Oklahoma.

This 11th day of July, 1919.

EVEREST, VAUGHT & BREWER,
Attorneys for Daniel J. Perry.

[Stamped:] Filed in Supreme Court of Oklahoma Jul- 11, 1919. William M. Franklin, Clerk.

12 Filed in Supreme Court of Oklahoma Jul- 11, 1919. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 9118.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

Order Granting Writ of Error from the Supreme Court of the United States.

Upon reading the petition and assignments of error of The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, praying for the allowance of a writ of error from the Supreme Court of the United States to this court to reverse the judgment of this court heretofore rendered on the 27th day of May, 1919, and it appearing from said petition and the record in this cause that a proper cause for the allowance of said writ is presented, it is ordered that the same be, and is hereby, allowed.

It is further considered, ordered and adjudged that the sum and amount of security which the said plaintiff in error shall give and furnish upon said writ of error be, and hereby is, fixed at Four thousand ($4,000.00) dollars, and that said security shall be by bond conditioned according to law and with sureties to be approved by the Chief Justice of the Supreme Court of the State of Oklahoma and

upon the giving and approval of such bond all further proceedings in this court be suspended and stayed until the determination of said writ of error in the Supreme Court of the United States.

Done this 11th day of July, 1919.

THOS. H. OWEN,
Chief Justice of the Supreme Court
of the State of Oklahoma.

[SEAL.]

Attest:
WM. M. FRANKLIN,
Clerk of the Supreme Court
of the State of Oklahoma.

13 [Stamped:] Filed in Supreme Court of Oklahoma. Jul-12, 1919. William M. Franklin, Clerk.

In the Supreme Court of the United States.

No. —.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because — the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Chicago, Rock Island and Pacific Railway Company and Daniel J. Perry, wherein was drawn in question the validity of a statute of the State of Oklahoma and of an authority exercised under, the said state by virtue of said statute, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of the validity of said statute of said state and authority exercised thereunder, and wherein was drawn in question the construction of a clause of the Fourteenth Amendment of the Constitution of the United States and the decision upheld said statute of the State of Oklahoma and authority exercised thereunder, and denying the construction of said clause of the Fourteenth Amendment of the Constitution of the United States contended for by the plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in

error, as by his complaint appears, we being willing that
14 error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 10th day of August, 1919, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. E. D. White, Chief Justice of the said Supreme Court, the 11th day of July, in the year of our Lord one thousand nine hundred and nineteen.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of the State of Oklahoma.

Writ of Error Approved.
THOS. H. OWEN,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma.

15 [Stamped:] Filed in Supreme Court of Oklahoma. Jul 12, 1919. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 9118.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

Bond.

Know all men by these presents, that we, The Chicago, Rock Island and Pacific Railway Company, a corporation, as principal,

and American Surety Company of New York, as surety, are held and firmly bound unto Daniel J. Perry, in the sum of Four thousand ($4,000.00) dollars, to be paid to the said obligee, his heirs, successors and assigns; to the payment of which, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of July, 1919.

Whereas the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, therefore, the condition of this obligation is such that if the above-mentioned plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, that this obligation shall be void; otherwise to remain in full force and effect.

148,484 A. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.
Principal.

By C. O. BLAKE,
By R. J. ROBERTS,
R. J. ROBERTS,
RAYMOND TOLBERT,
Its Attorneys.

148,484 A.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By HERMAN J. ROLEKE,
Resident Vice President.

Attest:

W. H. LEWIS,
Resident Assistant Secretary.

Evidence of authority of the officers executing this bond on the part of the surety, is on file with all Departments at Washington, D. C.

Bond Approved:

THOS. H. OWEN,
Chief Justice of the Supreme Court of the State of Oklahoma.

16 Filed in Supreme Court of Oklahoma, May 15, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 9118.

J. M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

Petition in Error.

Said plaintiff in error, Jacob M. Dickinson, Receiver for The Chicago, Rock Island and Pacific Railway Company alleges that on the 21st day of September, A. D. 1916, Daniel J. Perry obtained a verdict against the said plaintiff in error in the District Court of Oklahoma County, in the State of Oklahoma, for the sum of three thousand dollars ($3,000.00) and the costs of said action, and subsequently there was judgment entered thereon, in a certain action then pending in said District Court, wherein said plaintiff in error was defendant and said defendant in error was plaintiff; that the motion of the plaintiff in error for a new trial in said suit was overruled on the 18th day of November, 1916, and the original case-made and a transcript of the record and proceedings in said action in said District Court are hereto attached and made a part of this petition in error; that said plaintiff in error alleges that there is manifest error in said judgment and procedings affecting materially the rights of the said plaintiff in error, in this, to-wit:

First. That the trial court erred in overruling the motion of the said plaintiff in error for a new trial.

Wherefore, the plaintiff in error prays that said judgment be reversed, set aside and held for naught and that this cause be remanded to the trial court, with instructions to render a judgment in behalf of the plaintiff in error, dismissing the action.

C. O. BLAKE,
R. J. R.,
Attorneys for Plaintiff in Error.

Received May 15, 1917. —— ——, Clerk.

17 In the District Court of Oklahoma County, State of Oklahoma.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, Defendant.

Case-made.

(Copy.)

Appearances.

For the Plaintiff, Vaught & Brewer.
For the Defendant, C. O. Blake, K. W. Shartel, R. J. Roberts, W. H. Moore.

Filed in District Court Oklahoma County, Oklahoma, Mar. 19, 1917. James Beaty, Court Clerk, By Chas. Colt, Deputy.

18 *Index.*

19 In the District Court of Oklahoma County, State of Oklahoma.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, a Corporation, Defendant.

Be it remembered, that on the 11th day of March, 1916, the above named plaintiff commenced this action against the above named defendant by filing in the District Court of Oklahoma County, State of Oklahoma, his petition in writing, which said petition was afterwards amended, the amended petition, together with the indorsements thereon, appearing in words and figures as follows, to wit:

20 In the District Court in and for Oklahoma County, State of Oklahoma.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver of the Chicago, Rock Island & Pacific Railway Company, a Corporation, Defendant.

Amended Petition.

Comes now the plaintiff, and for his cause of action against the defendant, alleges and states:

That said plaintiff is a resident and citizen of Pottawatomie County, State of Oklahoma; that J. M. Dickinson is the legally appointed, qualified and acting Receiver of the Chicago, Rock Island & Pacific Railway Company, a corporation, engaged in the transportation of passengers and freight in the State of Oklahoma, and that said Receiver, or the said corporation, prior to the appointment of said Receiver, did, at the time hereinafter set forth, operate and maintain a line of railroad in the State of Oklahoma; and that it maintained shops and switching facilities for said road, at the city of Shawnee, State of Oklahoma.

That heretofore, to-wit: on or about the 30th day of June, 1913, this plaintiff was in the employ of said Railway Company, in the City of Shawnee, as a switchman; that on said day, while on a freight car, in the discharge of his regular duties, the said plaintiff attempted to, and did, apply the brake on said freight car; that the brake consisted of a round wheel on which were clutches, or
21 cogs, and that adjoining and fitting into said cogs or clutches was a small iron fixture known as a "dog;" that to apply the brake it was necessary to turn the axle on which the cogs or clutch wheel was attached, until the brake was tight, and then, with one's foot or hand, to apply the "dog" to the clutch, so as to hold it; that said clutch and "dog" were deficient in that they were badly worn, so as to be unfit to hold the brake and perform their functions, and that said condition of said "dog" and clutch was known to this defendant company, or by the exercise of reasonable care and inspection would have been known, at the time that said brake was applied.

That after the plaintiff had applied said brake, and had attached and affixed the "dog" to the clutch so as to hold the brake in place, plaintiff's hand was still on the wheel, or upper part of said brake, which wheel was that part of the brake to which the brakeman applied his hands in tightening said brake. While plaintiff's hand was still upon the wheel, with no fault upon his part, the "dog" slipped from the clutch, or ratchet; this because of its worn, de-

ficient, and unfit condition; the wheel turned quickly and rapidly, and threw this plaintiff to the ground, by reason of all of which, and because of and through the aforesaid negligence of defendant, plaintiff was severely injured, as hereinafter set out.

Plaintiff alleges that his back was severely injured; that his muscles were torn and lacerated, and even torn loose from the backbone; that plaintiff was taken to the Railroad Company's hospital in the city of Shawnee, where he was kept for two months, and then for a month he spent his time at the hospital and at his home, going back and forth from said hospital to the said plaintiff's home; that after the expiration of three months, or approximately that
22 length of time after the accident, said plaintiff was advised by the physicians and representatives and agents of the said Railroad Company, that he would be ready for work within a very short time, or as soon as he rested and regained his strength.

That he entered into a settlement with the said Railway Company, for the damages he had sustained, because of defendant's negligence, aforesaid, and executed a release, releasing the said Railway Company from any further liability because of the injuries to this plaintiff; that after said settlement had been made, this plaintiff was taken worse, and said Railway Company, at its own expense, carried this plaintiff to the hospital of the said Railway Company in the City of Chicago, where this plaintiff was treated for approximately one month by the physicians of said Railway Company, at the said hospital in Chicago.

That said plaintiff thereafter returned to Shawnee, on or about the 17th day of December, 1913; that he was weak, run-down and remained at home for approximately sixty days; that when he left the hospital in Chicago he was given a certificate directed to the General Yardmaster of said Railway Company at Shawnee, Oklahoma, advising said yardmaster that this plaintiff was able to resume work on his return to Shawnee, which certificate is hereto attached, marked Exhibit "A" and made a part of this amended petition.

On plaintiff's return to Shawnee from Chicago, he reported to the yardmaster, and was advised by said yardmaster that he was "out of service, because you are ineligible for duty," and stated further: "Doctor's reports show you are incapacitated. You will have to see the Superintendent." Plaintiff alleges that he saw the Su-
23 perintendent, and that said Superintendent replied to him: "You are incapacitated according to Doctor's reports." The plaintiff then exhibited his certificate from the Chicago surgeons in the employ of said Railway Company, which is here referred to as plaintiff's Exhibit "A," and the Superintendent replied: "I have got nothing like that in my office."

"Plaintiff alleges that said Railway Company refused to re-employ this plaintiff, although this plaintiff continued to apply for work from December, 1913, until August, 1915.

"On August 18th, 1915, the said Railway Company, through its Superintendent, H. F. Reddig, at Haileyville, Oklahoma, issued to this plaintiff a Service Letter, a copy of which Service Letter is hereto

attached, marked Exhibit 'B' and made a part of this petition; that after the issuance of said Service Letter, which Service Letter stated, after reciting the length of time which this Plaintiff had been employed by said Railway Company, 'Dismissed account responsibility in case of personal injury to himself, June 30th, 1913. Services otherwise satisfactory.' This plaintiff tried again to secure employment from said Railway Company, and he was advised by those having the authority to employ him, and by various employe-s of said Railway Company, that he could never secure employment from any railroad company, under that Service Letter, as it meant that he was black-listed, and meant also that he was personally responsible for his own accident, and that he could never secure employment from another railroad company."

"Plaintiff alleges that, not content with this answer, he applied in the year 1915, after the issuance of said Service Letter, to the General Yardmaster at Fort Worth, Texas, of the International and
24 Great Northern Railroad Company, the said Yardmaster having authority to employ plaintiff, and that the Yardmaster advised him that he was in need of men, and that he wanted a Switchman, and on being advised by this plaintiff that said plaintiff was an experienced Switchman, he asked this plaintiff for his references, whereupon this plaintiff exhibited his Service Letter issued by the Chicago, Rock Island & Pacific Railway Company, H. F. Redding, Superintendent, as aforesaid, and the said Yardmaster replied: "We can't use you on account of this letter."

Plaintiff alleges that thereafter he applied to the General Yardmaster of the Texas Pacific Railroad Company, at Fort Worth, Texas, said Yardmaster having authority to employ plaintiff as a servant for said Railroad; that plaintiff was advised by said Yardmaster that he was in need of brakemen, and this plaintiff replied that he was a Brakeman; that he had been a Brakeamn for many years, and when the Yardmaster asked this plaintiff for his credentials and references, this plaintiff exhibited his Service Letter from the said Chicago, Rock Island and Pacific Railway Company, as above referred to, which Service Letter is here shown as Exhibit "B". The Yardmaster of said Texas Pacific Railroad Company replied: "Can't use you on that letter."

Plaintiff alleges that he has been in the Railroad business for more than twenty-five (25) years; that he is now fifty-one (51) years of age; that he is in good health, except for an occasional hurting in his back; but that he works regularly at some kind of employment.

That at the time of his injury, hereinbefore described and set out, he was receiving from said Chicago, Rock Island & Pacific Railway Company, One Hundred Five and 50/100 Dollars
25 ($105.50) per month for thirty-one days; that he is now compelled to take such work as he can get, at $1.50 per day, or less; that he has spent the best years of his life in preparing and equipping himself as a Railroad man; that he is an experienced and trained Brakeman and Switchman, but that, because of the issuance

of said Service Letter by the said Railway Company, this plaintiff cannot procure employment either from the defendant company, or from any other railroad company; that by said Service Letter this plaintiff has been black-listed, and that he has been denied employment by other railroad companies because of the wording of said letter.

That under the American Mortality Table, this plaintiff alleges that his expectancy is approximately twenty (20) years, and he believes, and is advised that he would be able to perform the duties of a Brakeman, or a Switchman, for at least twenty (20) years; and that for his services as said Switchman or Brakeman, he would be entitled to receive not less than One Hundred Dollars ($100.00) per month, and that his wages for twenty years would be, under said calculation, the sum of Twenty-four Thousand Dollars ($24,000.00).

Plaintiff alleges that the issuance of said Letter, and the contents of that Letter, which said Letter did not truly state the facts, or give the true reason for his discharge, constitute the proximate cause of the refusal of all other railroad corporations to employ this plaintiff, and of the damages he has sustained by being prevented from obtaining employment; and that the refusal of other railroad corporations to employ this plaintiff is due directly and proximately to the issuance and contents of said Service Letter.

Plaintiff further alleges that the said Letter, upon its face, charges this plaintiff with being responsible, directly, for the injury
26 which he sustained on June 30th, 1913, and said statement is untrue, and at the time of the issuance of said letter was known to be untrue by defendant; but that, said plaintiff alleges, said Railway Company admitted its liability for said accident, which resulted in plaintiff's injury, by making a settlement with this plaintiff for said injury, by caring for him in its hospital, both in Shawnee and in Chicago, and rendering professional services free to this plaintiff.

Plaintiff further alleges that said settlement on the part of the plaintiff, and on the part of the defendant Railway Company, was made with the advice and sanction only of the defendant Railway Company's physicians and attorneys, and this plaintiff, while at the hospital, was not permitted to see any attorney, and when his own attorney called, this plaintiff was not permitted to see him, and that he never did see or consult an attorney in regard to his matters until after this settlement; but plaintiff alleges that by virtue of this settlement the defendant company admitted its own liability, and that therefore the statements and things set forth in said Service Letter were known by defendant to be not true, but that said Service Letter was issued to plaintiff for the purpose of preventing this plaintiff from securing employment either with the defendant company, or with any other railroad company; and that, by issuing said Service Letter, the said company has prevented this plaintiff from securing employment with any other railroad company, and that therefore, this plaintiff has been damaged in the sum of Twenty Thousand Dollars ($20,000.00).

Wherefore, plaintiff prays judgment against the said defendant,

J. M. Dickinson, as the Receiver of said Chicago, Rock Island & Pacific Railway Company, for and on behalf of said de-
27 fendant company, in the sum of Twenty Thousand Dollars ($20,000.00), and for the costs of this action.

VAUGHT & BREWER,
E. D. McLAUGHLIN,
Attorneys for Plaintiff.

28 EXHIBIT A.

Rock Island Lines.

Surgical Department.

Chicago, Ill., Dec. 5, 1913.

Mr. C. C. Fertig,
Gen. Yardmaster,
Shawnee, Oklahoma.

DEAR SIR:

In the case of Mr. D. J. Perry injured at Shawnee, Oklahoma, on June 30th, 1913, the injured party was able to resume work on the day of his return. He leaves Chicago Dec. 5, 1913.

Yours truly,

FERD. ENGELBREETSON, M. D.,
Local Surgeon, Chicago, Ill.

29 EXHIBIT "B."

Haileyville, Oklahoma,

August 18, 1915.

This is to certify: That, Daniel Jackson Perry has been employed on the Indian Territory Division of The Chicago, Rock Island and Pacific Railway ~~Company~~ as Switchman from November 1st, 1904, until July 1st, 1913.

Dismissed: Account responsibility in case of personal injury to himself June 30th, 1913. Services otherwise satisfactory.

H. F. REDDIG,
Superintendent.

Rock Island Lines. Office of Superintendent. Aug. 18, 1915. Haileyville, Okla., Indian Territory Division.

Indorsements: No. 19145. In the District Court of Oklahoma County. Daniel J. Perry, Pl't'f, vs. J. M. Dickinson, Rec. for the Chicago, Rock Island & Pac. Ry. Co., a corporation, Def't. Amended Petition. Filed in District Court, Oklahoma County, Oklahoma, May 25, 1916. James Beaty, Court Clerk, by Cliff Myers, deputy. Vaught & Brewer, Attorneys for Plaintiff.

30 Be it further remembered, that thereafter and on the 13th day of June, 1916, the defendant filed his answer to the amended petition of the plaintiff, which said answer, so filed, is in words and figures as follows, to wit:

31 In the District Court in and for Oklahoma County, State of Oklahoma.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Co., Defendant.

Answer.

Comes now the above named defendant as Receiver by his Attorneys, the undersigned, and for answer to petition herein presented, denies each, all and singular all allegations therein contained, except such as are hereinafter expressly admitted, and expressly admits that he, with Henry U. Mudge, was on the 20th day of April, 1915, appointed joint receiver for the railroad of the Chicago, Rock Island and Pacific Railway Company, and that subsequently on October 1st, 1915, he was made sole Receiver of said railroad; said appointments being made by the United States Court for the Northern District for the State of Illinois and the United States Court for the Western District of the State of Missouri.

II.

This defendant avers that said statute of the State of Oklahoma upon which plaintiff bases his action, and for which plaintiff seeks damages by reason of the breach of the same by this defendant, was at date of its passage and approval and at the date of the issuance of the service letter set out by the plaintiff therein as Exhibit "B," was unconstitutional and void, and deprived this defendant of due process of law and the equal protection of the law as guaranteed
32 to him under the 14th Amendment of the Constitution of the United States, and Section 7 of Article 2 of the Constitution of the State of Oklahoma; and for the further reason that said statute violates Section 22 of Article 2 of the Constitution of the State of Oklahoma, in denying to this defendant freedom of speech and the press, including the right to remain silent.

Wherefore, having fully answered, defendant prays to be dismissed with all his costs laid out and expended in this behalf.

C. O. BLAKE,
R. J. ROBERTS,
BLAKE & BOYS,
Attorneys for Defendant.

Indorsements: 19145. In the District Court of Oklahoma County. No. 19145. Daniel J. Perry, Plaintiff, vs. Jacob M. Dickinson, Receiver for the C., R. I. & P. Ry. Co., Defendant. Filed in District Court, Oklahoma County, Oklahoma, Jun- 13, 1916. James Beaty, court clerk, by Chas. Colt, deputy. Answer.

33 STATE OF OKLAHOMA,
Oklahoma County, ss:

In the District Court Thereof.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver of the Chicago, Rock Island & Pacific Ry. Company, a Corporation, Defendant.

Transcript of Proceedings on the Trial.

Now on this 21st day of September, 1916, the above entitled cause comes regularly on for trial, the plaintiff appearing in person, and by his attorney, Ed. S. Vaught, and the defendant appearing by its attorney K. W. Shartel, and both plaintiff and defendant announcing ready for trial a jury is duly called, empanelled and sworn to try said cause. Thereupon opening statements are made on behalf of the plaintiff and defendant respectively, whereupon the plaintiff produced the following evidence, to-wit:

DANIEL J. PERRY being called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Vaught:

Q. You may state your name to the court and jury?

By Mr. Shartel: Comes now the defendant and objects to the introduction of any evidence on the ground that plaintiff's petition fails to state a cause of action in his favor and against the defendant?

By the Court: Do you want to be heard?

By Mr. Shartel: No, sir, not at this time. I will raise it later.

By the Court: Objection overruled.

By Mr. Shartel: Exceptions.

A. Daniel J. Perry.

Q. Are you the Daniel J. Perry who is plaintiff in this
34 case?

A. Yes, sir.
Q. Where do you live?
A. Shawnee, Oklahoma.
Q. How old are you?
A. Fifty-one years old.
Q. What has been your occupation?
A. Railroading.
Q. How long have you been railroading?
A. Since 1889.
Q. How long is that?
A. Twenty-five or six years.
Q. Have you ever been in the employ of the Rock Island railroad?
A. Yes, sir.
Q. How long?
A. Nine years.
Q. Where did you begin your railroad work?
A. Thayer, Missouri, K. C. F. S. & M.
Q. How long did you work with them?
A. About a year.
Q. What other roads did you work for?
A. The Illinois Central.
Q. Any others?
A. I worked for the Mobile & Ohio a little while.
Q. When did you begin working for the Rock Island?
A. In 1904.
Q. Where?
A. At Shawnee.
Q. Did you work continuously for the Rock Island from 1904 to 1913?
A. Yes, sir.
Q. In what capacity?
A. Switchman.
Q. Have you ever had a suit against the Rock Island before?
A. No, sir, never have.
35 Q. Have you ever suffered any injury from the Rock Island Railroad company before the one alleged in this petition?
A. Yes sir.
Q. What was the nature of it?
A. I broke my arm, and maybe some ribs, once.
Q. Where was that?
A. In the Shawnee yards.
Q. Was any adjustment made between you and the Rock Island?
A. Yes sir.
Q. On whose proposition?
A. Theirs and mine together I guess.
Q. Did you employ attorneys in that case?
A. No sir.

By Mr. Shartel: That's objected to as immaterial and irrelevant, and outside the issues.

By Mr. Vaught: We have alleged a course of good conduct on the part of the plaintiff with the railroad company.

By the Court: I take it the only issue laid down in the pleadings is whether this plaintiff was responsible for his injuries.

By Mr. Vaught: It goes to his conduct during his employment with the railroad. If this letter is true he is a bad man and if it is not true we have a right to show it.

By the Court: Read the statements in the service letter. The service letter itself says that his services otherwise were satisfactory.

By Mr. Vaught: Very well, I shall not pursue that any farther.

Q. Now Mr. Perry, on or about the 30th of June, 1913, your petition alleges you suffered from an injury in an accident. Where did that accident occur?

A. In the Shawnee yards.

Q. Just state to the jury how that accident occurred?

A. Well, we were switching up there by the house track on
36 the west end of the house track and we was kicking a car. The fireman and the man who was following the engine kicked a car in, and as I was working the field it was my duty to catch this car——

Q. What do you mean by kicking a car?

A. Pull the pin and give it a kick and let it come by itself.

Q. By its own momentum?

A. Yes.

Q. All right, go ahead?

A. I got on this car and set the brakes, and when I had set the brake I started to get off and never took one of my hands off the brake wheel and the dog slipped out of the ratchet and let the wheel reverse and the way I was sitting I fell from there to the ground on the end of some ties.

Q. What was the condition of the dog and ratchet?

A. It seems there was a hole that had worn too much and it have the dog and brake rod too much play——

By Mr. Shartel: Are you speaking of your own knowledge and did you examine the brake rod yourself?

A. No, I did not examine it.

By Mr. Shartel: I move to strike out the evidence as a conclusion and hearsay.

Q. Did anybody who did examine this brake rod report to you its condition?

By Mr. Shartel: Objected to as a conclusion and hearsay, incompetent and immaterial.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

A. Mr. Sterling, a switchman who was working with me did.

Q. Whose duty was it to keep the dog and brake rod in good condition?

A. The car repairer.

Q. Had you ever used this particular car before?
A. No sir.
37 Q. Did you ever talk to the car repairer about this particular car?

By Mr. Shartel: Objected to as immaterial and irrelevant and calls for hearsay testimony.
By the Court: Sustained.

Q. Whose duty is it to look after all those matters and see for instance, that this dog and ratchet and brakes and everything was in good condition?

By Mr. Shartel: Objected to as a conclusion, and not the best evidence, the witness not shown possessed of knowledge with reference to that.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. Why it is the car repairer's duty.
Q. During your nine years' connection with the road, who did this particular work. That is, whose duty was it, and who did look after this work and see that these things were in proper condition?
A. The car repairer.
Q. Did the car repairer ever make any statement to you about the condition of this dog and ratchet?

By Mr. Shartel: Objected to as incompetent, and immaterial and calls for hearsay evidence.
By the Court: Sustained, not being such an agent as an admission would bind the defendant.
By Mr. Vaught: Exceptions.

Q. Did you ever talk to the Master Mechanic about this matter?
A. No sir.
Q. Did the President of the Rock Island Railroad Company ever come down to Shawnee and examine this brake?

By Mr. Shartel: Objected to as by-play and not a proper question.
By the Court: Sustained.

Q. How did you get hurt when you got thrown off the
38 car?
A. I fell off the car to the ground and on the end of some ties.
Q. How were you injured if you know?
A. Injured in the back.
Q. What was done with you?
A. I went home and stayed there four days and nights and then they carried me to the hospital in Shawnee.
Q. Who carried you to the hospital?
A. The Company's doctor.

Q. The Rock Island Railway Company's doctor?
A. Yes sir.
Q. Four or five months back and forth.
A. As soon as I got able to come back home I would come home and stay a night or two and then go back.
Q. How far did you live from the hospital?
A. Maybe a mile.
Q. How would you go from the hospital to your home?
A. They would send a cab or hack after me.
Q. Who would send it?
A. The Rock Island. The doctor would have it ordered for me.
Q. Who was the doctor that was waiting on you?
A. Dr. Blankendiffer.

By Mr. Shartel: I desire the court to instruct the jury not to consider the testimony of the witness with reference to the brake staff and ratchet.

By the Court: The motion to strike the testimony of the witness as to the condition of the staff and ratchet is sustained, the competency of the witness now being shown. You will therefore disregard the statements of the witness on that point, gentlemen.

By Mr. Vaught: To which we except.

Q. What was that doctor's name?
A. Blankensdiffer, or Blickensderfer.
39 Q. You had a man by that name waiting on you?
A. Yes sir.
Q. And the Rock Island sent him there?
A. Yes sir.
Q. How long were you in the hospital at Shawnee?
A. Four or five months I guess. There and home together.
Q. Did the Rock Island or anybody for them make any settlement with you for the injuries that you had received?

By Mr. Shartel: Objected to as incompetent, and irrelevant, but if Mr. Vaught will make the statement that he expects to limit that testimony to some other proposition and that it is not intended to show liability on our part we will withdraw our objection.

By the Court: There might be objection on the theory that a compromise is not an admission of liability. I never had the question before me before. I would like to hear from you if you have any authorit-es.

By Mr. Vaught: It is so elementary that we did not think it necessary. We have no authorities here.

By the Court: Objection overruled.

By Mr. Shartel: Exceptions.

A. Yes sir.
Q. Who did that, Mr. Perry?
A. Why the Claim Agent, Charles Hardcastle.
Q. During the pendency of your sickness, ask you if you had filed any claim with the Company for your injuries?

A. No sir, I had not.

Q. Ask you whether or not any attorney for you took this matter up with the railroad company?

A. No sir.

Q. After you left the hospital what did you do?

A. Which hospital?

Q. In Shawnee.

A. I went home.

40 Q. When was this settlement made with you with reference to the time you went home from the hospital at Shawnee?

A. It was quite a little while after I went home before the settlement was made.

Q. Then what occurred.

A. I got up and about and then in two or three weeks I got worse again.

Q. Was this back-set you had, was that before or after the settlement?

A. After the settlement.

Q. What was done with you then?

A. I got transportation and went to the hospital in Chicago.

Q. Who sent you there?

A. The Claim Agent got it for me, Mr. Hardcastle.

Q. What hospital did you go to when you arrived at Chicago?

A. I don't remember the name of the hospital, it was a hospital out there on Michigan Avenue some place.

Q. Who took you there?

A. I suppose one of the employees in Chicago took me out there in a car.

Q. Who paid your hospital bills there?

A. The Railroad Company. I was not out a cent.

Q. How long did you stay in Chicago, Dan?

A. The biggest part,—well not the biggest part but a good while in December. I don't remember exactly, but I got away some time in December. I got home about the 20th or 24th of December.

Q. Do you remember what time you left there?

A. I left Chicago December 15th, 1913.

Q. December 15th, or December 5th?

A. I could not say exactly about that.

Q. When you left there, ask you whether or not any paper was given you by the surgeon in charge as to your condition?

41 By Mr. Shartel: Objected to as incompetent, irrelevant and immaterial, leading and suggestive.

By the Court: Sustained, immaterial. What are the real facts with reference to the letter from the surgeon?

By Mr. Shartel: This plaintiff was not treated by the Rock Island, but by a Benefit Association of which he was a member.

By the Court: Are the surgeons employed by the Benefit Association, or by the Railroad Company?

By Mr. Vaught: We are offering this——

By the Court: What are the real facts?

By Mr. Vaught: The railroad company employs them themselves as we expect to show.

By the Court: As I understand it, the Railroad Company has no relation to the Benefit Association whatever.

By Mr. Vaught: This letter I have and will offer is from the Surgical Department of the Rock Island lines.

By the Court (addressing Mr. E. E. Blake): Mr. Blake, you are connected with the railroads, what are the facts about this?

By Mr. Blake: I am merely the audience, I just came in.

By the Court: What are the real facts?

By Mr. Blake: I am not in this case.

By the Court: What are the real facts? Aren't they separate from the railroads?

By Mr. Blake: You mean the Benefit Associations?

By the Court: Yes?

By Mr. Blake: Yes sir.

By the Court: And the railroad company does not employ the surgeons?

By Mr. Blake: They do sometimes. I will answer your Honor's questions the best I can. The Chief surgeon at Chicago is employed by the Company annually, and there are surgeons employed by the railroad. I know nothing about that paper you understand.
42 I don't want to get in this case. I just came in to see two good lawyers play.

By Mr. Vaught: The court has an idea, I gather from your remarks, that this is from some Benefit Association. Now this is from an officer of the Rock Island——

By the Court: The objection is sustained, no proper foundation showing the authority of the purported surgeon.

Q. Mr. Perry how long did you say you were at this hospital in Chicago?

A. The biggest part of December.

Q. To refresh your memory didn't you go there early in November, and leave there about December 5th?

A. It has been a good while, I don't exactly remember.

Q. While you were there, who treated you?

A. This doctor,—Dr. Engelbreetson.

Q. When you left here did you have any letter or anything to any doctor in Chicago?

A. Yes, I had a letter to—oh—I forget the name but some one in the claim department.

Q. Claim Department of what road?

A. The Rock Island.

Q. Did you go to the Claim Department when you got to Chicago?

A. Yes.

Q. What did you do?

A. I presented this letter and he sent a boy with me down to the New Jackson hotel. That was where all employees who go to see this doctor stay. He carried me down there and introduced me, and then he carried me over to see the doctor.

Q. What doctor?

A. Dr. Engelbreetson.
Q. Did he tell you who this doctor was?
A. Yes sir, he said he was one of the Company's——

By Mr. Shartel: Wait a moment. That is objected to and
43 we move to strike out the answer thus far as there is no agency shown, and is a conclusion.
By the Court: Sustained, calling for hearsay testimony.

Q. Did the Claim Department tell you where they would send you?
A. Yes, said they would send me to the hospital.
Q. Did they say to what hospital?

By Mr. Shartel: Objected to as incompetent, and immaterial.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. No.
Q. What did they say?
A. Said they would send me to the hospital and that I would stop at the New Jackson Hotel, and stay there.
Q. Did they tell you down there what doctor would wait on you?

By Mr. Shartel: Objected to as incompetent and immaterial.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. He said "this boy will take care of you. He will show you where to go."
Q. Did you know before you left Shawnee, what doctor would wait on you?
A. No sir.
Q. When did you meet Dr. Engelbreetson?
A. The next day after I arrived in Chicago.
Q. Ask you Mr. Perry whether anybody else other than this boy who was with you, advised you who Dr. Engelbreetson was?

By Mr. Shartel: Objected to as immaterial, and irrelevant, and calls for hearsay evidence.
By the Court: Overruled.

A. No sir.
44 Q. Did you ever talk to Mr. Rettig about Dr. Engelbreetson?
A. No sir.
Q. Did you ever show him a letter that you had from Dr. Engelbreetson?
A. Yes, I showed him the letter.
Q. What did he say about that?
A. Said he did not have anything like that in his office.
Q. Did he make any statement to you about what he would do if he did have something from that office?

By Mr. Shartel: Objected to as immaterial and irrelevant, this uit is not to recover damages for this letter and the failure to re-mploy Mr. Perry, but is for his failure to get employment under the ervice letter issued to him.

By Mr. Vaught: We are identifying Dr. Engelbreetson.

By the Court: What is the theory of your case?

By Mr. Vaught: The theory is this man came back from Chicago, ured. That he went to the various persons whose duty it was to mploy men, and they said in the first place that he had been dis-nissed, which was not true. That they then issued him this service etter to keep him from getting employment with any other rail-oad company in the United States. The whole purpose is to show he man's physical condition and that he was able to go back to work vhen he got back from Chicago. They claimed he was not, and all he time up to the time they issued this service letter they claimed heir refusal to take him back was based on his health, and when he service letter came out it was based on an entirely different proposition. We want to show the attitude of the railroad company o employ this man.

By the Court: You allege this letter was issued, and in the service letter it was stated the general services had been satisfactory to the defendant, and that he was respon- for certain injuries he sustained while in the employ of the Rock Island and that that statement was false and that he was not responsible, but the railroad company was responsible, and that on account of that false statement being made in the letter he was refused employment, and not on account of his physical condition.

By Mr. Vaught: We allege that he was physically able.

By the Court: But the refusal of the other roads to employ him was not as to whether he was or was not physically able, but the reason as you allege that he was unable to secure employment was because of this false statement in the letter, so it is immaterial whether he was or was not physically able. The question is, whether this statement in the letter that he was personally responsible for his own injuries kept him from being employed and was equivalent to placing him on the black list.

By Mr. Vaught: The issuance of the letter would not be per se grounds for damages if the statements were false. He must show that he actually sought employment and was refused.

By the Court: The point is that the false statement in the letter was the reason of his not securing employment and that it was not because of the fact that he was or was not physically able to work, but that he was rejected because of the fact that he was responsible for his own injuries sustained while in the employ of the Rock Island Is that correct?

By Mr. Vaught: It is in a measure. They claimed in their opening statement they had examined him and——

By the Court: Then whether he was able to perform manual labor is immaterial. Will you kindly suggest the relevancy of that testimony?

By Mr. Vaught: We plead that he is now an able bodied man, and that is a very important matter.

By the Court: The letter does not state that he is not able to perform manual labor.

46 By Mr. Vaught: Their opening statement was that he was refused employment on account of his physical condition.

By the Court: That statement I don't think is in the record, and it is immaterial.

By Mr. Vaught: They can't come in and——

By the Court: They can discharge a man with or without a reason, is not that correct. The point the court is trying to get at is you are relying upon a false statement in that letter, and that is that you were responsible for injuries you sustained and for that reason you were rejected and refused employment by the railways to whom you applied for work. Now as to whether this man was or was not in physical shape to perform the services for which he filed his application for employment is immaterial. The question is whether the statement made in that letter was or was not false.

By Mr. Vaught: That is true except as to——

By the Court: Now then I take it from what you have said that if the man was responsible for his own injuries, or that he was not responsible, I had better say, if he was not responsible for his injuries sustained while in the empl/y of the Rock Island, as this letter states he was, then that was equivalent to placing him on the black list and that no other railroad would employ him where he had been responsible for his own injuries and had been discharged for that reason?

By Mr. Vaught: Yes sir.

By the Court: Then the question of his health is immaterial and does not enter into the case.

By Mr. Vaught: That is not our theory at all. We had no way of knowing whether he would live one year or two or three. We want to show that he was strong and healthy when he applied to the railroad companies for work and this is an admission on their part that when he came back for work that he was able to go to work.

By the Court: Presume he was. And presume that he is

47 now or might now be a consumptive——

By Mr. Vaught: Yes, he might be dead.

By the Court: How could that affect their liability.

By Mr. Vaught: They are employing him. We want to show that he was in good health at the time he made these applications. That is the wording of this letter——

By the Court: I don't think that it is admissible.

By Mr. Shartel: My objection did not go to the point as indicated by the court. Our position is that his health is material on the question of damages.

By the Court: But this does not go to the condition of his health at that time.

By Mr. Shartel: This surgeon's letter was given to him two years prior to the date of the service letter. This letter from the surgeon

is dated December 5th, 1913, and the service letter is issued August 18th, 1915, two years later.

By Mr. Vaught: They refused to employ him on account of his health then, and two years later they issue a service letter in which they say he was discharged because of his responsibility for the accident.

By the Court: It is a circumstance tending to show the real cause of his discharge was not the fact that he was personally responsible for his injuries but that the real cause of his discharge was that he was physically unable to perform the services for which he was employed.

By Mr. Shartel: He was discharged at the time of the accident and not when he got this service letter. He was discharged at the time of the accident.

By the Court: I gather from the counsel's statements that he was not in the employ of the railway at the time this certificate or service letter was issued.

By Mr. Shartel: No sir.

By Mr. Vaught: This letter absolutely——

48 By the Court: And had not been in their employ since that time in 1913 when the accident occurred up to the time of the issuance of the service letter in 1915?

By Mr. Shartel: No sir. The grounds that we refused to employ him for are immaterial.

By Mr. Vaught: This letter absolutely denies the statement of counsel because it shows that he is in the employ of the company at the time when this letter is written. This letter shows on its face that he is in the employ of the company.

By the Court: Objection overruled.

By Mr. Shartel: Exceptions.

Q. What did Mr. Reddig say to you that he would do if he had a letter from Dr. Engelbreetson?

By Mr. Shartel: Objected to as incompetent, irrelevant and immaterial, and calls for hearsay evidence.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

A. Did not say anything. Said he did not have anything in his office like that.

Q. What did you say?

A. I said take this one, you can put it in your office.

Q. What did he say?

A. Did not say a thing but just handed it back to me.

Q. What did he say about employing you?

A. He said he could not employ me because I was incapacitated.

Q. Why did he say you were incapacitated?

A. On account of the doctor's reports.

Q. What did you say to him then about this report?

By Mr. Shartel: Objected to as immaterial and irrelevant.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

Q. State what you said about having a report from the doctor.

A. I said here is a report that says I am able for duty and
49 this is the last doctor that had his hand on me.

Q. I hand you this letter marked Exhibit "A" and ask you if this is the letter from the Rock Island doctor which you handed to Mr. Reddig, the Superintendent of the road?

A. Yes sir, this is the one.

Q. Who gave you that letter?

A. Dr. Engelbreetson, in Chicago.

By Mr. Vaught: We offer this letter in evidence.

By Mr. Shartel: Objected to as immaterial and irrelevant, and not an admission by anyone authorized by the defendant, and hearsay.

By the Court: The question is whether it is not admissible as a circumstance tending to show the real cause of his non-employment by the Rock Island was his physical ability to perform work, and not because he was responsible for the injuries sustained. I take it that is the object and purpose for which you are offering it Mr. Vaught. Is that correct?

By Mr. Vaught: Yes sir.

By the Court: And as a circumstance tending to show that the statement contained in the letter is not correct.

By Mr. Shartel: Remember that he was discharged prior to that time. His physical condition was not the same after the accident as it was before.

By the Court: Only a circumstance tending to show whether the statement was false, and it is admissible for that reason. The objection is overruled.

By Mr. Shartel: Exceptions.

50 Copy.

EXHIBIT "A."

Rock Island Lines.

Surgical Department.

Chicago, Ill., Dec. 5, 1913.

Mr. C. C. Fertige,
Gen. Yardmaster,
Shawnee, Oklahoma.

DEAR SIR:

In the case of Mr. D. J. Perry injured at Shawnee, Oklahoma, on June 30, 1913, the injured party was able to resume work on the day of his return. He leaves Chicago, Dec. 5, 1913.

Yours truly,

FERD. ENGELBREETSON, M. D.,
Local Surgeon, Chicago, Ill.

Q. Now Mr. Perry, when you got hurt you stated, I believe, you were taken immediately to a local hospital in Shawnee?

A. Not immediately, I could not go for four days and nights. I stayed at home.

Q. Ask you whether you were ever discharged from the employment of the Rock Island Railroad?

A. Yes sir, I was discharged once in the last nine years.

Q. I mean after the accident?

A. No sir.

Q. Ask you whether you received any notice from the Supreintendent or any one under the Superintendent that you had been discharged from the service of the Rock Island?

A. Yes sir, when I got back from Chicago, as soon as I picked up a little and felt like I was strong enough why I went to the yardmaster and told him I was ready for duty and showed him that letter, and he said "Dan you are out of the service" I said "What's the cause, Pete" and he says "Ineligible, you will have to see the Superintendent."

By Mr. Shartel: We now move to strike from the record the exhibit introduced by the counsel for plaintiff, which has been
51 identified as Exhibit "A" and move the court to instruct the jury not to consider the same in evidence as being any evidence whatever with reference to the statements made by the Doctor of the Rock Island at Chicago to Mr. Perry.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

Q. Did you have any further conversation with the yardmaster about why you could not go back to work?

A. Only that once. I did not ask him any more as he was changed off. He took the foreman of an engine and another yardmaster came in the employment, a Mr. Ray.

Q. Did you talk to him?

A. Yes sir.

Q. What did he say?

By Mr. Shartel: Objected to as immaterial and irrelevant and calls for hearsay.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

A. I showed him this letter and he said he could not do anything with a letter of that kind.

Q. You mean the certificate?

A. Yes sir,—not the certificate, the service letter I showed him.

By Mr. Shartel: The defendant now moves to strike the answer of the witness as not responsive.

By the Court: Sustained.

Q. Ask you when you got back from Chicago, and after you had rested up for a few days or a few weeks before you went to see the

Superintendent, did you have any further conversation with the Yardmaster about your employment?

A. Yes sir, I went to him and told him that I was ready for duty.

Q. What did he say?

A. He said "Dan you are out of the service."

Q. What did you say then?

52 By Mr. Shartel: Objected to as immaterial.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. I says "what is the matter Pete" and he says "you are ineligible."

Q. What did you say then?

By Mr. Shartel: Objected to as a repetition, immaterial and irrelevant.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. I said "What will we do about it," and he said "you will have to see Mr. Rettig, the Superintendent."

Q. Did you see Mr. Rettig?

A. Yes.

Q. Is this Mr. Rettig?

A. Yes.

Q. The large gentleman at the table here?

A. Yes.

Q. What did you say to him?

A. When I seen him the first time why he said "Dan I have been busy today and I will see you the next time I come in" and when he came in again I seen him and we walked up to the master mechanic's office, and we talked a while and he said "Dan I can't do anything for you. The reason I put you off was to look up the doctor's reports, and according to the doctor's reports I can't do anything for you."

Q. Then what did you do?

A. I did not do anything.

Q. Did you show him this letter?

A. Yes sir, I showed him this letter previous to that.

Q. That is the certificate from the doctor?

A. From the doctor in Chicago, yes.

Q. What did he say to that?

A. He said he did not have anything in his office like that.

Q. Ask you if you had any further conversation with the Superintendent before the issuance of this letter, this service letter?

53 By Mr. Shartel: Objected to as immaterial and irrelevant and too indefinite.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. Yes, I asked him for a service letter two or three times and he said he would give me one.

Q. How long after you received this service—how long was it after you asked for this service letter before you got it?

By Mr. Shartel: Objected to as immaterial.
By the Court: Sustained.

Q. Dan, when was the last conversation you had with Mr. Rettig about employment?
A. That was the last time, in the master mechanic's office.
Q. How long was that after you had got back from Chicago?
A. Must have been a month.
Q. That was in January, 1914?
A. Yes sir.
Q. When did you ask him for your service letter?
A. Why as soon as he said he could not do anything for me any more.
Q. And that was in January, 1914?
A. Yes sir.
Q. Now when did you get this service letter?

By Mr. Shartel: Objected to as immaterial and irrelevant to any issue here.
By the Court: Sustained.

Q. Did you get a service letter?
A. Yes sir.
Q. I hand you paper marked Exhibit "B" and ask you to state what that is?
A. This is the service letter he gave me.
Q. Is that his signature?

By Mr. Shartel: Objected to as the witness is not shown qualified to answer.
By the Court: Sustained.

54 Q. Do you know the signature of Mr. Rettig?
A. Yes, sir.
Q. How long have you been acquainted with Mr. Rettig?
A. I suppose about twelve years any way.
Q. How long have you been acquainted with his signature?
A. That long.
Q. How often have you seen his signature, Dan?
A. Every day if I wanted to. It was posted in the yard office.
Q. Did you ever see him write his name?
A. Yes.
Q. Now I will ask you if that is the signature of Mr. Rettig, the Superintendent of the Rock Island, Indian Territory division?
A. Yes, sir, that is his signature.

By Mr. Vaught: We now offer in evidence exhibit "B."

(There being no objection the same was read to the jury and is in words and figures as follows:

"EXHIBIT B."

Haileyville, Oklahoma,

August 18th, 1915.

This is to Certify: That, Daniel Jackson Perry has been employed on the Indian Territory Division of the Chicago Rock Island and Pacific Railway Company as Switchman from November 1st, 1904, until July 1st, 1913.

Dismissed: Account responsibility in case of personal injury to himself June 30th, 1913. Services otherwise satisfactory.

H. F. REDDIG,
Superintendent.

Stamped: "Rock Island Lines. Office of Superintendent, Aug. 18, 1915. Haileyville, Okla. Indian Territory Division."

Q. Ask you whether or not you went back to work for the Rock Island?

55 A. No sir.

Q. Ask you whether or not you ever applied for work with the Rock Island after receiving this service letter?

A. Yes sir.

Q. To whom did you apply?

A. Mr. Ray, the yardmaster at Shawnee.

Q. Who employs the help at the Rock Island yards at Shawnee?

A. The yardmaster employs the switchmen, and the trainmaster employs the trainmen.

Q. What position did you apply for?

A. Switching.

Q. To whom did you apply?

A. Mr. Ray, the yardmaster.

Q. What did he say to you?

By Mr. Shartel: Objected to as immaterial and irrelevant, calling for hearsay.

By the Court: Sustained.

Q. Were you employed?

A. No sir.

Q. Was there any reason given for your not being employed?

By Mr. Shartel: Objected to as immaterial and irrelevant, calls for a conclusion and hearsay.

By the Court: Sustained.

Q. Who refused to employ you?

A. At that time?

Q. Yes?

A. Mr. Ray, the yardmaster.

Q. Ask you whether or not anything was said about the service letter which you had?

By Mr. Shartel: Objected to as immaterial and irrelevant, calling for hearsay evidence.
By the Court: Sustained.

Q. Ask you whether or not you exhibits this service letter
56 to Mr. Ray, the yardmaster?

By Mr. Shartel: Objected to as immaterial.
By the Court: Overruled.

A. Yes sir.

(Thereupon the hour of adjournment having arrived the court duly admonished the jury, and court is adjourned until 1:30 P. M.)

Court duly convened at 1:30 P. M. the parties plaintiff and defendant being present, the jury are called and all answer present to roll call. Thereupon the plaintiff, D. J. PERRY resumes the stand for further direct examination.

By Mr. Vaught:

Q. Now Mr. Perry, when you made this settlement before you went to Chicago, I believe you stated that you made it with the Claim Agent?
A. Yes, sir.
Q. Ask you if the Claim Agent made any statement to you as to why he was settling with you at that time?

By Mr. Shartel: Objected to as immaterial and irrelevant, calling for hearsay evidence. Any statement made by the Claim Agent would not be binding on the defendant.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. Why he said if I would settle now——
Q. Just answer if he made a statement?
A. Yes.
Q. What did he say?

By Mr. Shartel: Objected to as immaterial and irrelevant, and any statement made would not be binding on the defendant.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

57 A. He said if I would settle now I could get my money and go off some place and get well a good deal quicker than if I stayed at one place.
Q. Did he make any statement to you as to the investigation that had been made as to the condition of this brake on the car?

By Mr. Shartel: Objected to as immaterial and irrelevant, calling for hearsay evidence.

By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. Yes, sir.
Q. What did he say?

By Mr. Shartel: Same objection.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. Why he said there was a deficiency in the brake and they were ready to settle for it.

By Mr. Shartel: Move to strike as not responsive and any statement made by the claim agent under the circumstances would not be binding on the defendant.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

Q. Did you have any doctors in Shawnee examine you before you went to Chicago?
A. Yes, sir.
Q. Who were they?
A. Dr. Rowland, for one.
Q. Who was he?
A. He is the trainmen's doctor.
Q. Anybody else?
A. Hughes and Herrington, and they are the switchmen's doctor.
Q. Anybody else?
A. No sir.

Q. Did any Company doctor examine you before you
58 went to Chicago, just before you left the hospital, or immediately after?

A. Dr. Blankensdiffer waited on me all the time.
Q. Who is he?
A. The Company doctor.
Q. At Shawnee?
A. Yes sir.
Q. Is he here?
A. No sir.
Q. What did he say as to your condition?

By Mr. Shartel: Objected to as immaterial and irrelevant, calling for hearsay evidence.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. He said he thought I would be able to go to work in a couple of months.

Q. Then after you got back from Chicago and went down to see the yardmaster about going back to work and as you stated this morning that he told you that he could not take you back because you were ineligible, ask you if he stated anything else at that time?

By Mr. Shartel: Objected to as immaterial and irrelevant and calling for hearsay evidence.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. Yes.
Q. What did he say?
A. He said "the doctors have got you Dan, we can't do anything more for you."
Q. Did he say anything else?
A. He said I would have to see the Superintendent before I could go back to work.
Q. Did he say anything else?
A. Yes, he said "this clearance you have got——
Q. Now this is after you got back from Chicago and before
59 you got your service letter?
A. Yes he told me the doctors had me and he could do nothing for me, and for me to see the Superintendent.
Q. Did he make any statement to you as to what the doctors had said about you?
A. Yes sir, said I was disabled and incapacitated.
Q. Did he make any other statement about what the doctors had said? To refresh your memory, ask you whether or not this man said anything to you about what the doctors said about your being able to do a day's work?
A. Yes, he said "the doctors say you are not able to do a day's work."
Q. When did this conversation occur?
A. This conversation was when I got back from Chicago and went to Pete to go to work.
Q. Who is Pete?
A. The yardmaster.
Q. Pete who?
A. Fertige.
Q. Is that the same man to whom this letter was addressed by the doctor in Chicago?
A. Yes sir, the same man.
Q. Now after you went to see the Superintendent, Mr. Reddig, did he make any statement to you about what the doctors said about you?
A. No sir, he said the doctors' reports show that you are not able to do a day's work.
Q. Who was it said that?
A. Mr. Reddig.
Q. The Superintendent?
A. Yes sir, he said he had looked over the reports of the doctors and said "you are not able to do a day's work."
60 Q. That was in December or January, 1914?
A. Yes sir.
Q. Now Dan, what have you been doing since January, 1914?
A. Working for the Woods Produce Company.
Q. What wages do you get?

A. $1.50 a day.
Q. What wages did you get with the Rock Island?
A. $3.50 a day.
Q. I believe you stated you have not done any work for the Rock Island since you got hurt?
A. No sir.
Q. Have you applied for work to the Rock Island since you got hurt?
A. I asked Mr. Ray the present Yardmaster for work. I asked him if he could do anything for me and he said no.
Q. Did he state any reason?

By Mr. Shartel: Objected to as immaterial and irrelevant, calls for hearsay evidence and repetition.
By the Court: Sustained, not binding on the defendant.

Q. Ask you if you have made any applications to any other railroad companies for employment since this?
A. Yes sir.
Q. When and where?
A. Fort Worth, Texas.
Q. To whom did you apply at Fort Worth?
A. The Yardmaster of the T. & P.
Q. Do you remember who he was?
A. Yes sir, I know his name.
Q. Can you tell his name at this time?
A. Yes.
Q. What was it?
A. J. F. Ingram.
Q. What did he say to you?
A. I asked him was he hiring any men and he said he——

61 By Mr. Shartel: Just a minute. That is objected to as immaterial and calls for hearsay evidence.
By the Court: Sustained.

Q. Do you know that he was hiring men?

By Mr. Shartel: Same objection.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. Yes.
Q. From whom did you learn that?
A. He told me himself that he was hiring switchmen.

By Mr. Shartel: I move to strike out the answer and ask that the jury be instructed not to consider the answer.
By the Court: Sustained.

Q. What did you do?
A. I gave him this service letter.
Q. State whether or not you gave him this service letter as a result of his statement to you?
A. Yes sir.

Q. State whether or not you received employment?
A. I did not.
Q. I will ask you to state what he said when you showed him this letter?

By Mr. Shartel: Objected to as immaterial, irrelevant and hearsay.
By the Court: Sustained.
By Mr. Vaught: Exceptions.

Q. You showed him this letter?
A. Yes.
Q. And you were not employed?
A. No sir.
Q. Did you apply for work any where else?
A. Yes, the I. & G. N. man, I asked him for work.
62 Q. What did he say?

By Mr. Shartel: Objected to as immaterial and hearsay.
By the Court: Sustained.
By Mr. Vaught: Exceptions.

Q. Ask you whether or not they were needing men?
A. He did not say. I handed him the service letter and he read it and said he could do nothing for me on this kind of a paper.

By Mr. Shartel: We move the answer be stricken out and the jury instructed not to consider the same as hearsay and immaterial.
By the Court: Sustained.
By Mr. Vaught: Exceptions.

Q. Did you as a result of what he stated to you exhibit this service letter?

By Mr. Shartel: Objected to as immaterial and irrelevant and calls for a conclusion.
By the Court: Sustained.

Q. Did you show him this service letter?
A. Yes sir.
Q. What did he do?
A. He handed it back to me. He read it and handed it back to me.
Q. Were you employed?
A. No sir.
Q. Ask you whether or not you have sought employment any where else?

By Mr. Shartel: Objected to as immaterial and irrelevant.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. Yes sir.
Q. Where did you apply?

A. I went to Ardmore and applied there to the Ringling road that runs about thirty miles west.

Q. To whom did you apply there?

63 A. The Superintendent.

Q. What did you do?

A. I asked him was he hiring any men.

Q. What else did you do?

A. And he said that——

Q. Don't state what he said. What else did you do?

A. I handed him this service letter.

Q. What did he do?

A. He read it.

Q. Were you employed?

A. No sir.

Q. Do you know whether or not they were employing men at that time?

A. Yes.

Q. Were they?

A. He told me so.

By Mr. Shartel: Objected to and move to strike the answer as hearsay.

By the Court: Sustained.

Q. Do you know whether or not they were employing men at that time?

A. Yes sir.

Q. Were you employed?

A. No sir.

Q. Did you seek employment any where else?

A. Yes.

Q. Where?

A. The Katy, here at Oklahoma City.

Q. To whom did you apply there?

A. Mr. Gardner.

Q. Who is he?

A. The Trainmaster.

Q. What did you do?

64 A. I handed him this letter and asked him for a job.

Q. What did he do?

A. He read it.

Q. Were you employed?

A. No sir.

Q. Did he say why you were not employed?

By Mr. Shartel: Objected to as immaterial, irrelevant and hearsay.

By the Court: Sustained.

By Mr. Vaught: Exceptions. Comes now the plaintiff and offers to prove by this witness that in each of the instances in which he sought employment, and in which he exhibited the service letter in this case, that he was advised in each case that he could not be used by them because of this letter. Because of the wording of this letter, and that the statement in said letter that he was dismissed for

personal responsibility for the accident of June 30th, 1913, was responsible for his non-employment in the above cases.

By Mr. Shartel: Objected to as immaterial, and irrelevant and calls for hearsay.

By the Court: Sustained.

By Mr. Vaught: Plaintiff excepts.

Q. Where was the last time that you sought employment of the railroad company?

A. This was the last time, here in Oklahoma City.

Q. How long have you worked in the railroad business?

A. Since 1889.

Q. What other work have you done since that time?

A. Practically none.

Q. Ask you whether or not you are qualified to do any other kind of work?

A. No sir, that is all I know how to do.

Q. What is the condition of your health at this time?

A. Good.

65 Q. What is the nature of the work you have been doing in the past year?

A. Working in a wholesale house, handling vegetables, potatoes and first one thing and another.

Q. Did that require lifting?

A. Yes sir.

Q. Ask you whether or not you are able at this time to do the class of work that you did do while you were working for the railroad company?

A. Yes, sir.

Q. Dan, are you acquainted with the manner in which a man may sever his connection with one railroad company and secure employment with another?

By Mr. Shartel: Objected to as immaterial and irrelevant.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

A. Yes sir.

Q. You may just explain how that is?

By Mr. Shartel: We make the same objection.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

A. You mean where a man is dismissed?

Q. Say you left the railroad company of your own volition and desired to secure employment from another railroad company, what would be necessary?

A. Why if you are going to leave them you will resign and then ask for your service letter stating the date you commenced and the date you quit.

Q. Ask you whether or not it is not necessary in securing employment from any other railroad, to exhibit a service letter from the road that last employed you?

By Mr. Shartel: Objected to as immaterial and irrelevant, and calls for a conclusion.

By the Court: Overruled.

66 By Mr. Shartel: Exceptions.

A. Yes sir.

Q. When you went to work for the Rock Island, did you have a service letter from the road you last worked for?

A. Yes sir.

Q. Did you exhibit that letter before you were employed?

By Mr. Shartel: Same objection.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

A. Yes sir.

By Mr. Vaught: You may cross-examine.

Cross-examination.

By Mr. Shartel:

Q. Who was the claim agent you settled with, Charley Hardcastle?

A. Yes sir.

Q. I believe you stated on direct examination that Dr. Rowland was the physician representing the switchmen's union?

A. The train men.

Q. He examined you, did he?

A. Yes.

Q. About when was that?

A. Some time before I went to Chicago, I don't remember the date

Q Some time between the latter part of November and the time you were injured, in June previous?

A. Yes sir, I guess so.

Q. Did he examine you again after that?

A. No, sir, just the one examination is all.

Q. Dr. Rowland was your family physician was he?

A. No sir.

Q. Who was your family physician?

A. Dr. Baxter.

Q. At the time that Dr. Rowland examined you, was that

67 at your request or the request of the train men's union?

A. I don't remember now.

Q. Did Dr. Rowland tell you what your condition was at that time?

A. No sir.

Q. Is it not a fact that at that time he told you that you were suffering from arterial sclerosis, and were incapacitated from doing your work?

A. He made out a statement, but did not tell me nothing. I don't know what it was.

Q. Some time the latter part of December 1913, or the first of January, 1914, did you go to Dr. Rowland and ask him to change his report of total disability on you. Did you ask him to change his report?

A. What was the date?

Q. Some time the latter part of December or first of January.

A. After I came back from Chicago?

Q. Yes?

A. I had gotten well again then.

Q. You went to him and asked him to change his report?

A. I asked him to examine me again, that I was all right.

Q. Did he examine you again?

A. No sir.

Q. Did you go back again and ask him to change his report?

A. I don't think so.

Q. When did you go out of the service?

A. The day I was hurt. Have not worked any since.

Q. You were out of the service from that day were you?

A. I was entitled to hospital benefits, had never been discharged, you understand, but never did do any more work.

Q. You paid a hospital fee to the benefit association every month, or twice a month, didn't you?

68 A. That was deducted from our wages, you know how that is, so much every month.

Q. Then it was the hospital benefit association that was taking care of you during the time you were in the hospital?

A. That was before the hospital benefit association was organized. That was the Company hospital.

Q. You were not paying a hospital fee?

A. It was taken out of my wages. I wasn't in any accident company at all.

Q. No, but every month there was taken out of your wages a fee for the benefit association was there not?

A. For Hospital benefits. Company hospital benefits.

Q. Taken out of your wages?

A. Yes, taken out of all employees.

Q. And this fee you were paying, what was that for?

A. Hospital benefits.

Q. In case you were sick you could go to the hospital and would not have to pay out any money?

A. Yes.

Q. And in case you got hurt you could go to the hospital and be treated and not have to pay out any money?

A. Yes.

Q. Did any other doctor examine you and tell you that you had arterial sclerosis, or hardening of the arteries?

A. I don't remember.

Q. Did Dr. Baxter ever tell you that?

A. No, sir, Dr. Baxter never told me that.

Q. Some years ago you used to be a very heavy drinker didn't you?

By Mr. Vaught: Objected to as immaterial.
By the Court: Overruled.

A. Must have been several years ago you know. It was before Prohibition I guess.
Q. You have not been a heavy drinker since prohibition?
A. No, can't get it.
69 Q. About three years prior to the accident, didn't Dr. Baxter advise you that you would have to quit drinking on account of the condition of your veins and arteries?
A. I never drank that heavy, no sir.
Q. Your family physician advised you that you would have to quit drinking?
A. No sir.
Q. Did you apply to the General Yardmaster at Fort Worth, of the I. & G. N.?
A. Yes sir, the Yardmaster, or Trainmaster, I don't know which he was.

By Mr. Shartel: That is all.

Redirect examination.

By Mr. Vaught:

Q. This fee that was taken out of your wages, by whom was that taken?
A. Taken by the Company. I never did see that.
Q. Were you ever consulted as to whether it should be taken out?
A. No sir.
Q. That wasn't left to you but is an agreement between the employees and the railroad company that this should be taken out every month?
A. That is no new thing. That has been going on ever since I have been with the Company.
Q. And you have been with them nine years?
A. Yes sir.
Q. They have been taking so much out of your salary for nine years?
A. Yes sir.
Q. How many times have you been in the hospital in nine years?
A. Not very many. I had a broken wrist once, and two or three times for little injuries, and maybe sick once or twice.

70 By Mr. Shartel:

Q. You stated it was an agreement between the employees and the Railroad Company?
A. Yes sir.
Q. By that, you mean between your unions and the Company?
A. Yes sir.

By Mr. Vaught:

Q. Between your unions and the railroad Company?
A. Yes sir, Trainmen and Switchmen and all the orders.
Q. These hospitals are maintained by the Company, however?
A. Yes sir.

By Mr. Shartel:

Q. Do you know of your own personal knowledge that the Hospital was maintained by the Company, that the Company paid the bills for maintaining them, or is it just surmise on your part?
A. I pretty well know it. I have been paying it for nine years.
Q. You don't know who the railroad company gives the money to that they keep out do you?
A. No sir, supposed to be for hospital benefits.
Q. You don't know whether the Hospital benefit is a different thing from the Railway or not, do you?
A. No sir, I do not.

By Mr. Shartel: That is all.

(Witness excused.)

By Mr. Vaught: It is admitted by and between the parties hereto, plaintiff and defendant, that the American Mortality Tables will show that the expectancy of a person fifty-one years of age, is slightly in excess of twenty years.

71 D. J. PERRY being re-called as a witness in his own behalf being examined

By Mr. Vaught:

Q. How long have you been a switchman, Dan?
A. I never switched any until I came to Shawnee.
Q. Nine years?
A. Yes.
Q. During those nine years, how much of the time did you have the same kind of work you had when the accident occurred?
A. The same kind all the time.
Q. Were you acquainted with the handling of brakes in general?
A. Yes sir.
Q. Now I will ask you how you handled the brakes on this particular occasion?
A. Just like I would on any other car. I just set the brakes and started to get down and the dog flew out and it whirled around and threw me to the ground. That is all there is to it.
Q. How do you put the dog in the clutch?
A. With your foot.
Q. Where is the clutch with reference to the top of the brake?
A. The wheel sets on top of the brake-staff, and then on the top of the car is the ratchet and dog.

Q. Had you ever had an accident, or had a clutch to slip out with you before this accident occurred, during the nine years you worked as switchman?

By Mr. Shartel: Objected to as immaterial and irrelevant.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

A. No sir.
Q. Now the way the dog was arranged, and the clutch was it necessary to use your foot in order to put the dog in the clutch?
A. Yes sir.

Q. How long was it after you had put the dog in the clutch
72 until it slipped out?

A. Not until I set the brake up pretty tight to stop the car from rolling.
Q. Did you stop the car?
A. Yes sir.
Q. How long was it after the car stopped after you had quit turning the brake staff until the dog slipped out?
A. Why just as soon as I got one hand off of it and turned around to get off. (Snaps fingers.) That is how it was.
Q. Had you ever seen this particular car before?
A. No sir, don't think I did.
Q. Of course you did not see it afterwards, after you were hurt and taken to the hospital?
A. I didn't see the car any more after I hit the ground.
Q. Ask you whether you had any way to examine this dog and ratchet after the accident happened?

By Mr. Shartel: Objected to as immaterial.
By the Court: Sustained.
By Mr. Vaught: That is all.

(Witness excused.)

Plaintiff rests.

By Mr. Shartel: Comes now the defendant and demurs to the evidence introduced by the plaintiff upon the ground and for the reason that the same fails to show facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff.
By the Court: Overruled.
By Mr. Shartel: Exceptions.

73 H. F. RETTIG (REDDIG) being called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Shartel:

Q. State your name?
A. H. F. Rettig.

Q. Where do you live?
A. El Reno, Oklahoma.
Q. What business are you engaged in?
A. Railroading.
Q. What company do you work for?
A. The Rock Island.
Q. In what capacity?
A. Superintendent.
Q. Were you Superintendent of the Indian Territory division at the time Dan Perry was working there and was discharged?
A. Yes.
Q. How long have you been in the railroad business?
A. Twenty-one years.
Q. How long have you been Superintend-nt for the Rock Island?
A. Five years.
Q. In what capacity were you with the Rock Island before you became Superintendent?
A. Trainmaster.
Q. The hiring of employees working on the Indian Territory division, was under your supervision was it not?
A. Yes sir.
Q. Ask you to state whether or not you issued orders on your division regarding men under you in hiring other men to demand their service letter?
A. No sir.

By Mr. Vaught: We move the answer be stricken as the question is leading and suggestive and is the testimony of counsel.
74 By the Court: Motion sustained, being immaterial.
By Mr. Shartel: Exceptions.

Q. Ask you to state Mr. Rettig, whether or not it was the policy of the Rock Island, before employing men as switchmen to demand a service letter?

By Mr. Vaught: Objected to as leading and suggestive.
By the Court: Overruled.
By Mr. Vaught: Exceptions.

A. No sir, service letters are frequently fraudulent and we don't depend on them and don't require them.

By Mr. Vaught: We move all of the answer after the words "no sir" be stricken as not responsive.
By the Court: The motion to strike the answer wherein he says they are frequently fraudulent is stricken, not responsive.

Q. Do you know why the service letter is not demanded, or the reason for the policy of not demanding a service letter?

By Mr. Vaught: Objected to as calling for a conclusion.
By the Court: Sustained, immaterial.

Q. Has the Rock Island a policy with reference to employing switchmen over a certain age. Employing them for the first time.

By Mr. Vaught: Objected to as immaterial.
By the Court: Overruled.
By Mr. Vaught: Exceptions.

A. Yes sir.
Q. What is that age limit?
A. 45 years of age.
Q. Then men over that age, are they or not employed as switchmen?
A. No sir.

By Mr. Shartel: That is all.
By Mr. Vaught: No questions.

(Witness excused.)

75 C. B. WILDMAN, being called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Shartel:

Q. State your name?
A. C. B. Wildman.
Q. Where do you live?
A. Van Buren, Arkansas.
Q. What is your business?
A. Railroading.
Q. What company do you work for?
A. The Iron Mountain.
Q. What position do you hold with that company?
A. Superintendent.
Q. How long have you been in the railroad business?
A. 34 years.
Q. Mr. Wildman, has the Company you work for, a policy in any way restricting the age at which switchmen will be employed for the first time?
A. Yes sir.
Q. What is that policy?
A. We do not employ switchmen over 45 years of age.
Q. Do you know whether or not that policy is general as to all the other railroads?

By Mr. Vaught: Objected to as a conclusion.
By the Court: Overruled.
By Mr. Vaught: Exceptions.

A. That is the general policy of railroads.
Q. Has your railroad company a policy with reference to demanding service letters before employing switchmen?
A. We have.
Q. What is it.
A. We do not demand service letters.

Q. Do you know the policy of other railroads in this part of the country with reference to that?

76 By Mr. Vaught: Objected to as leading and calls for a conclusion.

By the Court: Overruled.

A. I do.

Q. What is that policy?

A. It is very much the same on all railroads in this section of the country.

Q. And what is that?

A. To not demand or put any special reliance on a service letter.

By Mr. Shartel: That is all.

Cross-examination.

By Mr. Vaught:

Q. What railroad are you connected with?

A. The Iron Mountain.

Q. How long have you been with the Iron Mountain?

A. Thirteen years.

Q. Where were you before you went to the Iron Mountain?

A. The Chicago & Alton.

Q. Say you don't employ switchmen for the first time who are over 45 years of age?

A. Not if we know it.

Q. If a man moves from Oklahoma, from a Rock Island district in Oklahoma over into a section of Arkansas in which there is no Rock Island, and through which your road operates, and he has been a man of long service, continued successive service in the Rock Island employ, would your age limit apply then if he should ask for employment from you?

A. Yes sir.

Q. If a man has worked for forty years, until he is 50 years of age with another Company, you would not take him on your line at all?

A. Not as a switchman.

Q. Even though he had been a switchman before?

A. Even if he had been a switchman before we would not take him if he was over the age limit.

77 Q. How long do you let a man work for you?

A. You mean a man already in service?

Q. Yes.

A. As long as we considered that he is capable of doing his work satisfactorily.

Q. Do you consider a man if he has passed fifty years of age, incapable of doing any work?

A. That depends altogether on the man. Some men might be. Ordinarily, a man fifty years old is not capable of switching in the yard. He is too old, the hazard is too great.

Q. How many men have you got on your division who are over fifty years of age, who are switchmen?

A. I don't know of any.

Q. Do you know that you haven't any?

A. I am not positive that we don't have any, but I don't think we have.

Q. There is a prrety general understanding between railroads about these matters as to age limit and so on is there?

A. Yes, there is a general understanding as to age limit in train and yard service.

Q. Mr. Wildman, if you knew that a man was discharged from the Rock Island railroad because of his personal responsibility for an accident would you employ him on your line?

A. I have employed many a one that I knew was responsible for an accident.

Q. Do you consider that then is a sufficient reason to discharge a man?

A. I do.

Q. Would you employ a man for the same reason that you would discharge him?

A. We do do that very frequently, yes sir. I might add by way of explanation that those things are handled as matters of discipline on a railroad and while possibly it would not be policy to keep this man on that railroad it would not keep him from working
78 on another railroad.

Q. If you discharged a man after he was fifty, he could not get on another railroad?

A. Possibly not as a switchman.

Q. If a man was discharged for the reason I gave you, after he was fifty years of age, it would absolutely bar him as a switchman on any other railroad in the United States?

A. The fact that he was discharged from responsibility in an accident would not, but the age limit possibly would.

Q. If he was discharged at that age?

A. He probably would not be able to secure work as a switchman.

Q. That is rather severe punishment is it not?

By Mr. Shartel: Objected to as immaterial, irrelevant and calls for a conclusion.

By the Court: Sustained, immaterial.

Q. The custom of a railroad is if a man is discharged after he is fifty years of age, he is out for the rest of his life if he is a switchman?

A. With the general line of service he is, yes sir. He is too old to get a job as switchman. That is not altogether looked upon as a hardship to the man. Very often you are doing him a favor.

Q. How long, or at what age does this custom prevent your employing a man for brakeman?

A. The same limit.

Q. This limit applies to brakemen and switchmen?

A. Yes, sir, train service, or yard service.

Q. Then if you had a good man in your employ as a switchman or brakeman you would be rather particular about discharging that man knowing that he could not be employed by any other road, would you not?

By Mr. Shartel: Objected to as immaterial.
By the Court: Sustained, immaterial under the issues.

Q. Now you say you don't pay any attention to a service letter?

79 A. I don't pay a bit of attention to service letters.

Q. You mean by that you would take a man whether he had a service letter or not?

A. If I wanted a man I would take him and investigate his record afterwards.

Q. Would you employ a man coming from another railroad company without looking up his record?

A. No sir, we look up his record.

Q. Your railroad has a record of any employee, and is willing to give that information to the other roads?

A. Yes sir.

Q. So if Mr. Perry is discharged from the Rock Island for some reason sufficient to them and he would apply to you for work, you would get a record or a statement as to his record from the Rock Island before you employed him?

A. No sir, we employ him and then look up his record. We have sixty days to do that. We take him on approval for sixty days according to our agreement with the switchmen and trainmen, and if we don't disapprove of their record within sixty days they are in service.

Q. What other service can a switchman do after he reaches the age of fifty?

A. That is a hard matter for me to outline what a switchman can do after he is fifty. He can do a lot of things.

Q. What would you do with a man who had been a switchman all his life and who had reached the age of fifty or the age limit?

A. I don't know, that would depend on the man and what I had that he could do or what I could get from him.

Q. His chances for securing employment would be pretty slim would they not?

A. I don't think that they would. Possibly they would be slim as to getting a job as switchman, but I am not prepared to say about other lines of work.

Q. What other work would a switchman be qualified to do?

A. That depends on the man. Some switchmen might not
80 be qualified to do any other kind of work except possibly manual labor while others could do other kinds of work. A man might be qualified to be a yard master, or assistant yard master.

Q. You don't make those promotions after a man gets to be fifty very often do you?

A. Yes sir, quite often. There are lots of yardmasters who are over fifty years old and even sixty.

Q. Not when they are first made yardmasters?

A. Yes. A man to be yardmaster, you understand that he does not have to do the hazardous work that a switchman does. The yardmaster does not have to handle any cars.

By Mr. Vaught: That is all.

(Witness excused.)

J. M. CHANDLER, being called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Shartel:

Q. State your name?

A. J. M. Chandler.

Q. Where do you live?

A. Springfield, Missouri.

Q. What business are you engaged in?

A. Railroad.

Q. With what Company?

A. The Frisco.

Q. In what capacity?

A. I am inspector of transportation.

Q. What different official positions have you held with the Frisco?

A. I have been trainmaster and superintendent and various other minor positions prior to that time.

Q. And you are now superintendent of transportation?

81 A. Yes.

Q. How long have you been in the railroad business?

A. About nineteen years.

Q. Mr. Chandler, has the Frisco railroad a policy with reference to the employment of switchmen over a certain age limit?

A. It has.

Q. What is that policy?

A. We do not employ switchmen, or men in the train service beyond 45 years old.

Q. Do you know whether or not that policy is a general policy among all railroads?

A. I don't know it to be a fact but it is my impression that it is a general policy.

By Mr. Vaught: I move the answer be stricken, the witness showing himself to be disqualified.

By the Court: Sustained.

Q. Has your railroad a policy with reference to requiring a service letter from switchmen before employing them?

A. It has the policy that service letters will not be required.

Q. Do you know whether or not that policy is general with the other railroads?

A. It is my information that it is.

By Mr. Vaught: I move the answer be stricken, as hearsay.

By the Court: Sustained, the answer being apparently based upon information.

By Mr. Shartel: Take the witness.

Cross-examination.

By Mr. Vaught:

Q. Do you know what the Texas & Pacific does in those matters?

A. I do not.

Q. Do you know anything about what the I. & G. N. does with reference to such matters?

A. No sir, not of my personal knowledge.

Q. Do you mean to say that when you were Superintendent
82 of a road that a man coming to you and asks for employment that you do not call for a service letter?

A. We may look at his service letters. Our instructions are not to do so. We don't consider them of any special value unless we happen to know the signature of the man who signs the service letter. The instructions are not to consider them at all.

Q. How long have you been doing that?

A. I could not say. For a long period of years.

Q. You know that the laws of Oklahoma require that service letters be issued to employees leaving the service do you not?

A. Yes sir.

Q. And that they are issued?

A. Yes sir.

Q. So you take a man whether he has a service letter or not?

A. Yes sir.

Q. Do you take a man from another road without looking him up?

A. We employ the man, but under our contract with the men we have sixty days to inspect his record previous to employment by our Company, and if we are satisfied with our investigation at the end of sixty days his application is automatically approved. If we are not satisfied we decline the application within that time without question.

Q. Do you say you have no switchmen in your employ over fifty years of age?

By Mr. Shartel: Objected to as the witness did not make such statement.

By the Court: Sustained, immaterial.

Q. Do you have any switchmen in your employ over fifty years old?

By Mr. Shartel: Same objection, immaterial.

By the Court: Sustained.

Q. You did state that you did not employ switchmen or brakemen on your road who were over fifty years of age?

A. Over 45.

Q. After a man who is a switchman or brakemen reaches
83 the age of 45, what do you do with them?

A. It depends on conditions. We don't make any disposition of him if he is capable and not incapacitated and goes ahead with his work.

Q. Then the 45 year age limit does not apply unless the man is incapable in some way?

A. It applies to any man entering the service.

Q. What is the age of the oldest man you have in your service as switchman or brakeman?

A. I couldn't say.

Q. You have some who are 65 don't you?

A. I don't think so.

Q. Are you sure?

A. Yes, I am sure of that.

Q. Have you some that are sixty?

A. I am not going to undertake to say. We have something like five thousand miles of railway and I don't know all of the employees.

Q. You don't know at what age brakemen or switchmen are called incapable of further service? You only know what the rule is, and the custom on your part?

A. I know the rule and the custom as to their employment. We don't throw a man out of service when he gets to be 45 and I don't mean to convey that impression. I had reference only to the employment of men.

Q. A man who is thrown out of service as a brakeman, however, after he has passed 45 would have a hard time to get in any where else, is that your statement?

By Mr. Shartel: Objected to, immaterial and irrelevant.

By the Court: Sustained, immaterial.

By Mr. Vaught: That is all.

(Witness excused.)

84 G. S. BAXTER, being called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Shartel:

Q. State your name?

A. G. S. Baxter.

Q. Where do you live?

A. Shawnee, Oklahoma.

Q. What is your occupation?

A. Physician.
Q. Of what school are you a graduate?
A. Memphis Hospital Medical College.
Q. How long have you been practicing medicine?
A. Eleven years and a little over.
Q. Are you admitted by the State Board to practice medicine in the State of Oklahoma?
A. I am.
Q. Are you acquainted with Dan Perry here?
A. I am.
Q. How long have you known Mr. Perry?
A. I have known him between six and seven years.
Q. Did you ever examine Mr. Perry at any time?
A. I have.
Q. About when was that?
A. Wells ix or seven ago he had pneumonia and I was with Dr. McGee treating Mr. Perry, treating an attack of lobar pneumonia that has been seven years ago this winter, and then at infrequent intervals since that time I have prescribed for him for various ailments.
Q. Were you his family physician?
A. Well I have waited on his family since I have been to Shawnee.
Q. When was the last time you examined Mr. Perry?
A. It must have been in the summer two or three years ago. 1913, I believe, in August or September. I don't recall
85 whether *whether* I have examined him since or not.
Q. Did you make a complete examination of him at that time.
A. I made sufficient to enable me to advise him as to his condition.
Q. What was his condition at that time?
A. At that time he was suffering with a disease of the blood vessels called arterial sclerosis.
Q. What is that?
A. Hardening of the blood vessels, arteries, veins and capillaries.
Q. How long had he had that disease?
A. I could not say. It may have been coming on for a few years. No way of determining how long an individual has had it. It comes on slowly and gradually. It is a gradual progressive disease and in some instances progresses more rapidly than in others.
Q. Does it become progressively worse, or better?
A. Usually, unless there is some regulation as to habits and diet, it gradually gets progressively worse. In some instances it may remain stationary, or temporarily better, but never well. The individual is never cured.
Q. Did you hear Mr. Perry testify?
A. Just a part of it.
Q. Ask you to state whether or not at any time you advised Mr. Perry he would have to quit drinking?

By Mr. Vaught: Objected to as leading and suggestive.

By the Court: Overruled.
By Mr. Vaught: Exceptions.

A. Why at the time that I had a talk with him relative to the condition of his blood vessels I told him that it was necessary to abstain from alcohol as well as to regulate his mode of living and physical exercise.

Q. Did Mr. Perry give you a history as to his symptoms and condition?

A. As to his physical condition?

Q. Yes?

A. Yes sir.

86 Q. What was that history?

A. Well the symptoms varied at different times. At this particular time he was complaining of headaches.

Q. Did he give you a history as to what his mode of life was?

A. He had told me that he had previously consumed booze—I don't know as he attempted to estimate the quantity or the time, but he gave me a history of having drunk some booze. I don't remember how much. Perhaps not to such an extent as to incapacitate him or cause him to lose his job, but he said he had drunk some booze.

Q. Is this disease of arterial sclerosis a disease of young or old men?

A. It may be either. Mostly of old men, but a young man may have that condition. It is found more frequently in elderly individuals.

Q. Is it or not a condition that you find in old men?

A. It is a condition that is frequently found in old men, yes.

Q. What was the condition of Mr. Perry's arteries when you examined him. Were they in an advanced stage of this disease or not?

A. Moderately so. They were hard and easily felt at that time.

Q. Have you examined him since he has been over here?

A. No, I have not.

By Mr. Shartel: That is all.

Cross-examination.

By Mr. Vaught:

Q. When did you examine him?

A. I am not sure of the date. I think August or September,—in the summer any way,—of 1913.

Q. That was just after he had mashed up his blood vessels a little was it not?

A. I think it was after his injury.

Q. You know that he was injured on June 30th?

A. I didn't know the date. I know he was in the hos-

87 pital.

Q. This examination of yours was between the date of his injury and December of that year?

A. Possibly so,—yes, I think so.

Q. Does this disease you speak of result from one being intemperate or may it result from injury?

A. It does not result from injury. It may result from intemperance of physical drain, but not from injury because it is a general blood vessel disease.

Q. Did you tell him that he was a hard drinker and had to quit it?

A. I told him he would have to abstain from alcohol.

Q. Did you know that he had been drinking?

A. I knew that he had occasionally and he told me he had.

Q. Your information that he had been addicted to the use of intoxicating liquors came from what he told you? Rather than from any independent knowledge?

A. Yes sir.

Q. He told you when this state went dry that it was necessary for a bunch of them to help put it out of the way and that he was one of the volunteers?

A. No, he did not tell me that he had volunteered at that time. He gave me a history of having drunk before the state went dry.

Q. Then it was before the state went dry that he did most of his drinking?

A. I think so.

Q. Since you have known Dan in the last six or seven years did you ever know of his having been addicted to the use of intoxicants?

A. I never saw him drunk.

Q. Did you ever see him drinking?

A. I have smelled it on his breath.

Q. There is a good many of your patients that you could say the same thing about?

A. Yes sir.

88 Q. That is more general than this condition of the blood vessels you speak of is it not?

A. I could not say as to that.

Q. A good many folks take a drop occasionally don't they?

A. I don't know that. I can speak for myself.

Q. You smell it on their breath occasionally don't you?

By Mr. Shartel: Objected to as immaterial.

By the Court: Sustained.

Q. Have you examined Dan recently?

A. No, sir.

Q. Looking at him now, does he look as if he was afflicted with anything?

A. The only thing you would notice about Mr. Perry is the change in his eyes. An old man's eyes.

Q. Do you think he is a/ old man?

A. He is not a young man.

Q. Not a spring chicken?

A. No. He is older than he looks to be.

Q. He is able to do physical labor is he not?
A. Certain kinds of physical work. Hard physical labor is not good for him.
Q. Hasn't he, ever since you examined him been at hard work.
A. Not that I know of.
Q. Has not had any hard work since you examined him?
A. I am sure I don't know how hard his work has been.
Q. Did you examine him after he came back from the hospital in Chicago?
A. I don't know. I remember of his being in Chicago and being in my office after he came back from Chicago. He was in my office visiting several times, socially. I don't think that I prescribed for him.
Q. He has never asked you to prescribe for him since he got back from Chicago?
A. I would not say for sure.
89 Q. What can you say as to his condition now with reference to the time you examined him. How does it compare?
A. I don't know, have not examined him lately. Very doubtful if there is much change in his condition. Don't think it would improve.
Q. Your conclusion is based upon your knowledge of other cases?
A. Yes sir.

By Mr. Vaught: That is all.

Redirect examination.

By Mr. Shartel:

Q. Could you at this time by feeling of Mr. Perry's arm where the arteries are, tell us whether the disease had advanced or receded?
A. I could not tell you to what degree without taking the blood pressure.
Q. Could you by feeling of Mr. Perry's arm teil whether that disease was still there?
A. Yes sir.
Q. I wish you would examine him please?

(Here the witness examines the pulse of the plaintiff.)

Q. What do you find?
A. Hardened arteries.
Q. Do you notice any difference in their condition?
A. Not from the condition of the veins. They are still hard. I could not say they are any harder than they were before.
Q. Are you acquainted with what the duties of switchmen are, in a general way?
A. I think so.
Q. In your opinion, Doctor, please state whether or not Mr. Perry is capable of performing the duties of a switchman at this time?

By Mr. Vaught: Objected to as calling for a conclusion, this man not being shown to be a trainman.

By the Court: Overruled.

90 A. Well, generally no. Not only a switchman, but anything as hazardous or as difficult.

By Mr. Shartel: Take the witness.

Cross-examination.

By Mr. Vaught:

Q. I wish you would show me that hardened artery?
A. Feel of his wrist.
Q. Feel of mine and see if I am getting old?

(Witness feels pulse of counsel, Mr. Vaught)—You are a young man yet.

Q. That is the only indication you find is it. Right here?
A. I just examined the superficial arteries. You can find that in any superficial artery where you can palpate it.
Q. You did assist Dr. Blankenship when Perry was hurt didn't you?
A. I was just thinking. Possibly I helped tie a plaster jacket while he was in the hospital. I did not treat him, but would not say positive that I did not help do something. I have so many with first one thing and another that it would take a catalogue to hold them all, but I believe that I did help tie a jacket on Mr. Perry.
Q. And this examination was after that?
A. I think so.

By Mr. Vaught: That is all.

(Witness excused.)

91 T. D. ROWLAND, being called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Shartel:

Q. Your name is what?
A. T. D. Rowland.
Q. Where do you live?
A. Shawnee.
Q. What is your profession?
A. Physician and surgeon.
Q. Of what school are you a graduate?
A. Memphis Hospital Medical College.
Q. How long have you been practicing medicine?
A. Since 1903.

Q. You are admitted to practice by the State Medical Board of Oklahoma, are you?
A. Yes sir.
Q. Are you acquainted with Dan Perry?
A. Yes sir.
Q. How long have you known him.
A. A good long time, probably twenty years.
Q. Have you ever examined Mr. Perry?
A. Yes sir.
Q. When was that?
A. Along in the summer or fall of 1913.
Q. At whose request was that examination made?
A. The trainmen. Brotherhood of Railway Trainmen.
Q. Were you their physician?
A. Yes sir.
Q. What was the result of that examination. What condition did you find Mr. Perry to be in at that time?
A. The examination was for a total disability. I recommended that the disability be paid.
Q. What do you mean by that?
A. The examination was made for his insurance for total
92 disability. I examined Mr. Perry and recommended to the Trainmen that they pay this insurance.
Q. When was that examination made?
A. In 1913, the latter part of the summer or fall.
Q. What was the cause of that total disability?
A. I recommended the disability be paid on account of arterial sclerosis, or hardening of the arteries.
Q. Did Mr. Perry ever apply to you after that time to examine him again.
A. Yes sir, we had two conversations on the subject of examination after that.
Q. Where were you at the time you made the examination that—or did you know at the time of that examination that Mr. Perry had been in an accident shortly prior to this time?
A. Yes sir.
Q. State whether or not in your opinion the accident in any way caused the condition you found in Mr. Perry?
A. No sir.
Q. Could you at this time feel of Mr. Perry's arteries and determine whether or not that disease was still present?
A. At this time?
Q. Yes.
A. I think so.

By the Witness: Dan, will you let me feel your arm?
By the Plaintiff: Yes, I don't object at all.

(Witness feels of plaintiff's arm at wrist.)

Q. What do you find doctor?
A. I think he has arterial sclerosis.
Q. Are you familiar with the general duties of a switchman?

A. With their general duties, I think so.
Q. Now in your opinion, doctor, is Mr. Perry capable of performing those duties?

By Mr. Vaught: Objected to as calling for a conclusion, witness not having been shown qualified to pass on the qualifications of this man for a position.
By the Court: Overruled.
93 By Mr. Vaught: Exceptions.

A. I will state that it was my opinion when this examination was made, and I so stated in my report that his railroad days were over in my opinion on account of this hardening of his arteries. The disease does not get better with years and I don't think his condition has changed since that time.
Q. Is this a disease of old age or youth?
A. Principally of old age. It can come on at any time in life, but it is always associated with old age.
Q. Has Mr. Perry the arteries of a man of the age of 51?
A. No, his arteries are much harder.
Q. Of what age would you say?
A. They would average probably 65. His blood pressure might be older than that.

By Mr. Shartel: That is all.

Cross-examination.

By Mr. Vaught:

Q. What is the condition of his arteries now as compared with what they were then. Is there any difference?
A. I can't tell any by feeling of them.
Q. And that has been three years ago?
A. Yes.
Q. Then Dan is as old now as he was then?
A. Certainly.
Q. And he is as good now as he was then?
A. With the exception of these three years.
Q. And you say you can't see any effect they have had on him?
A. Not by feeling.
Q. Did he ever recover anything from the Trainmen on account of total disability?

By Mr. Shartel: Objected to as immaterial.
By the Court: Sustained.

Q. Is it not a fact that a later and another examination developed that he was not totally disabled and they declined to
94 pay him any part of that total disability?

By Mr. Shartel: If you will bring out everything that this witness knows on the subject we will not object.

By Mr. Vaught: I have asked me question, and if there is anything else you want brought out that is relevant you can do so.

By Mr. Shartel: We object to the question as immaterial and irrelevant.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

A. I don't know. There was no other examination made by me.

Q. You do know that Dan improved right along after that?

A. No, I never examined him any more.

Q. You don't know anything about his condition then except from that one examination you made three years ago?

A. That is all I know about it. I had two conversations with him after that about an examination but I made no other examination.

Q. Did Dan come back and say that he would like for you to examine him again?

A. Yes, sir, he came back a few months after this and I don't recall how we discussed it, or how it came up, but we discussed another examination and I told him I would be glad to make the examination, but on investigation we found that Dan had lapsed in his policy and was no longer a Trainman, and therefore we could not examine him any more. He had no further claim against the Trainmen. He had let his policy lapse.

Q. What do you mean by that?

A. He had not paid his dues and was delinquent.

Q. You knew that Dan had been in the hospital for six months did you not?

A. That is my recollection,—it was some time after the
95 injury.

Q. You refused to examine him because he was no longer a Trainman?

A. Well, we consulted the Secretary and found that he was not a member of the trainmen.

Q. Not in good standing?

A. No sir.

Q. He requested another examination didn't he?

A. Yes, sir, some time later he said that he had an opportunity to get back in the train service and wanted me to examine him again, and that was during the past year according to my recollection.

Q. You did not examine him then did you?

A. No sir.

Q. Why not?

A. Well my reasons that I recall that I gave Dan was that his condition would be the same as they were when I first examined him, that was one reason, and the next was that I was not the proper man to examine him for the train service, we not being the Company physicians.

Q. You are one of the Company physicians are you not?

A. No, sir, I was with the Order of Railway Trainmen.

Q. Do you mean to say that Dan's condition, his physical condition is that of a man 65 years old?
A. Yes, sir, that would be my estimate of his age.
Q. Do you know some of the switchmen in Shawnee?
A. Yes, sir, I know the majority of them.
Q. How old is the oldest man there?
A. I don't know their ages.
Q. Do you know Henry Sharp?
A. Yes, sir.
Q. How old is he?
A. I don't know his age. He looks to be 55 at least. I would guess him to be that old.
Q. Is he not 65?

96 By Mr. Shartel: Objected to as immaterial.
By the Court: Sustained.
By Mr. Vaught: That is all.

(Witness excused.)

E. E. RICE, being called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Shartel:

Q. What is your name?
A. E. E. Rice.
Q. Where do you live?
A. Shawnee, Oklahoma.
Q. What is your business or profession?
A. Physician and surgeon.
Q. Of what school are you a graduate?
A. University of Louisville.
Q. How long have you been engaged in the practice?
A. Twenty years.
Q. Here in this state?
A. Yes sir.
Q. Do you know Dan Perry?
A. Yes sir.
Q. Did you ever examine him?
A. Yes, sir.
Q. When was that examination made?
A. I will have to refer to my notes made at the time. (Witness refers to paper) July 15, 1913.
Q. What was the condition of his health at that time?
A. Mr. Perry was in the hospital as the result of an injury and I made a physical examination and found no evidence of injury, but found evidence of arterial sclerosis.

97 Q. When was that?
A. July 15, 1913.

Q. In your opinion could that arterial sclerosis be chargeable to the accident which he had received immediately prior to that?

A. No sir, that accident occurred a week or so before that and it would have nothing to do with that condition I found.

Q. What is arterial sclerosis?

A. It is a disease of the blood vessels, a hardening of the veins and arteries.

Q. What is the ultimate result of the disease?

A. Well those cases usually die young or have a stroke of paralysis.

Q. Does that disease become progressively worse or better?

A. Ordinarily progressively worse where the condition is due to alcohol or intemperance. It can be checked and sometimes considerable improvement noted in the blood pressure by proper living.

Q. Did you take his blood pressure at that time?

A. Yes sir.

Q. What was it?

A. 180.

Q. What is normal?

A. The normal for a man of his age at that time is about 130. His age at that time being 48.

Q. Could you examine the arteries in his arm and tell whether or not he was still suffering from arterial sclerosis?

A. Yes sir.

Q. I wish you would do that?

(Witness here feels of the arm of plaintiff.)

Q. What do you find?

A. I find a hardened condition of the superficial arteries.

Q. Is this a disease of youth or old age?

A. Old age as a rule.

98 Q. Has Mr. Perry the arteries of a man 51 years old?

A. Not of a man in good health.

Q. About what age would you say?

A. We would expect that condition normally in a man 65 or 70. Some people don't have that hardened condition before they are 80 or 85.

Q. Is a man any older than his arteries?

A. It is said that he is not.

Q. Are you familiar with the duties of a switchman?

A. Just about as much so as the ordinary citizen I presume. I have lived in a railroad town for a great many years.

Q. In your opinion, doctor, is Mr. Perry capable of performing the duties of a switchman?

By Mr. Vaught: Objected to as the witness has disqualified himself by saying that he knows no more about that than the ordinary citizen, and the jury can form the opinion as well as the witness.

By the Court: Overruled.

By Mr. Vaught: Exceptions.

A. No sir, I don't believe that he is capable of performing properly the duties of a switchman.

Q. Do you notice any difference in his condition now and what it was at the time you examined him?

A. A man's sense of touch is not as accurate as the blood pressure test. I could not tell by the touch. If I had the instruments for taking the blood pressure I could tell exactly. That is we depend on the instrument for taking the pressure very much, and don't depend on our sense of touch.

By Mr. Shartel: That is all.

Cross-examination.

By Mr. Vaught:

Q. Say you examined him a week after the accident and could find no evidence of an injury at all?

A. No sir.

Q. What did they put him in that plaster cast for?

99 A. He was not in the plaster cast when I examined him.

Q. He was in a plaster cast within a week after you did examine him wasn't he?

A. So I have heard since I have been here. That is not saying that he was not injured, but he had no physical evidence of injury.

Q. What do you mean by that?

A. Nothing that you could see.

Q. Nothing that you could tell by feeling of him. Could not tell that the flesh and muscles were torn loose from the back bone?

A. No sir.

Q. You know he was in the hospital for six weeks don't you?

A. He was in the hospital for examination and he was there when I examined him.

Q. What were you called for?

A. To make a physical examination.

Q. What was the result of your examination?

A. No evidence of injury, that is no physical evidence. I found a tenderness to the left of the upper sacral region and some soreness but no evidence of fracture or dislocation. Temperature normal.

Q. And from that examination did you report that the man had anything wrong with him or not?

A. I reported that he had arterial sclerosis and neurasthenia.

Q. What is that?

A. That is a condition where a patient complains of something that you can not find any physical evidence of.

Q. Was it your opinion that it existed, or not?

A. What?

Q. Neurasthenia?

A. Yes.

Q. He complained of pain but you could not tell that it was there?

A. No sir.

Q. The only evidence you had was his word?

100 A. Yes.

Q. Would you put a man in a plaster cast on his word?
A. I did not.
Q. Would you?
A. I might. Under certain mental conditions that might be good treatment.
Q. What do you mean by that?
A. Some people have to be treated like they want to be treated in order to get results.
Q. Did you examine Mr. Perry any more?
A. No sir.
Q. Who was his attending physician?
A. Dr. Blankensdiffer.
Q. Have you ever talked with his doctor?
A. This examination was made jointly with him.
Q. Dr. Blankensdiffer is the man who put him in a plaster cast?
A. I don't know. There was no cast on him then.
Q. You know he stayed in the hospital several weeks?
A. Yes, I saw him at the hospital at the time of the examination.
Q. That was three years ago?
A. Yes sir.
Q. And you can't see any difference in the condition of his arteries now and then?
A. Not by the sense of touch.
Q. It is pretty hard for a man to tell by the sense of touch whether there is anything wrong with the arteries or not?
A. Not at all, but the degree of injury is hard to tell.
Q. You can't tell that?
A. No sir.
Q. You can't tell whether he just has a touch of it or whether it is bad?
A. Yes you could tell that, but I could not tell whether his blood pressure is 140 or 160 by the sense of touch.
Q. Then your statement that he had the same arterial
101 sclerosis that a man of 65 would have is just guessing at it?
A. Not at all. Up until within the last four or five years we had to depend upon our sense of touch to make a diagnosis, but since then we have instruments by which we can measure accurately the extent of the disease and whether or not it is progressive.
Q. In what per cent of the working men do you find this condition you speak of?
A. At what age?
Q. Fifty.
A. You don't find that condition in one in a hundred.
Q. What per cent of the men working around railroad shops and on trains and in the yards where they endure considerable strain who are fifty years of age that have this condition?
A. Very few so far as my knowledge goes.
Q. How many railroad men have you examined for this particular disease?
A. I have practiced medicine for fifteen years and the most of my work has been for railroad men and their families. I don't

think of anybody of that age that had it. I don't recall anybody that has it.

Q. You don't know of anybody?

A. No sir.

Q. Do you know Dr. Hughes?

A. Yes sir.

Q. And Dr. Ferrington?

A. Yes sir.

Q. How do they stand as physicians?

A. Their standing is first class.

Q. In an examination of this kind would there be any evidence in the urine of this condition of the blood?

A. Not necessarily so. We examine for increased blood pressure and if it was a very advanced state the urine might show
102 disease.

Q. Do you know Dr. Engelbreetson, of Chicago?

A. No sir.

By Mr. Vaught: That is all.

(Witness excused.)

H. F. RETTIG, being recalled for further cross-examination.

By Mr. Vaught:

Q. Mr. Rettig, have you any men in your employ as brakemen or switchmen who are over 45 years of age?

A. Yes sir.

Q. How many?

A. I don't know. I have only been on this division that I am now on, since July 1st.

Q. Are you on the Shawnee division?

A. No sir.

Q. You are over here now?

A. Yes.

Q. How many are there on the Shawnee division?

A. I could not tell you.

Q. Do you know Henry Sharp?

A. Yes.

Q. How old is he?

A. I don't know. He is over 45, but I don't know how old he is.

Q. He is sixty is he not?

By Mr. Shartel: Objected to as immaterial.

By the Court: Sustained.

Q. Do you know Dr. Engelbreetson?

A. No, sir, never heard of him until his name was mentioned today.

Q. Who is your local surgeon in Chicago?

A. I could not tell you.
Q. It might be Dr. Engelbreetson?
A. It might.

By Mr. Vaught: That is all.

(Witness excused.)

By Mr. Shartel: The defendant rests.

103 DANIEL J. PERRY, being recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct examination.

By Mr. Vaught:

Q. Mr. Perry, ask you whether or not at the time you applied for work on any of these railroads after this service letter was issued to you, did any of those trainmasters, or yardmasters or Superintendents ask you your age?

By Mr. Shartel: Objected to as incompetent and immaterial and calls for hearsay.
By the Court: Sustained, not rebuttal.
By Mr. Vaught: Exceptions.

Q. Ask you whether or not your service letter or credentials were requested in each case you applied for work?

By Mr. Shartel: Objected to as immaterial and irrelevant and calls for hearsay.
By the Court: Sustained.

Q. Ask you whether you exhibited your service letter each time you applied for work.

By Mr. Shartel: Same objection.
By the Court: Sustained, repetition.

Q. How long have you been in the railroad work?
A. Since 1889, about 25 or 26 years.
Q. Do you know from your knowledge of railroad work and your experience, do you know at what age brakemen are employed, brakemen or switchmen are employed on the Rock Island?

By Mr. Shartel: Objected to as not shown properly qualified to answer and not rebuttal.
By the Court: Overruled.

A. No sir.
Q. You don't know at what age?
A. No, sir.
Q. Do you know, while you were connected with the Rock Island of any case where brakemen were employed over the age of 45?

By Mr. Shartel: Objected to as last above.
104 By the Court: Overruled.

A. Yes, sir.
Q. State a case. Can you name it?

By Mr. Shartel: Same objection.
By the Court: Overruled.

A. Not by the Rock Island particularly, but I noticed a case the other day. Harry Harrington was employed by the Katy and is working there now.
Q. How old is he?
A. He told me he was 48 years old.

By Mr. Shartel: We move to strike the answer as being hearsay and immaterial.
By the Court: Sustained, hearsay.

Q. Do you know this man Sharp at Shawnee?
A. Yes.
Q. How old is he?
A. He looks to be not under 65. He is the oldest man in the yards.
Q. Switchman is he?
A. Yes, sir.
Q. Do you know the age of any of the others there?
A. No, the others are not over 35 or 40 I guess.
Q. Do you know whether or not anybody at any time ever objected to your working on the Rock Island as a switchman or brakeman on account of your age?

By Mr. Shartel: Objected to as not proper rebuttal, and calling for hearsay evidence and immaterial.
By Mr. Vaught: Exceptions.

Q. Did you ever apply for work on the Frisco?
A. No sir.
Q. Or the Iron Mountain in Arkansas?
A. Never did.

By Mr. Vaught: That is all.

(Witness excused.)

Plaintiff rests.

By Mr. Shartel: Defendant rests.

Case closed.

105 STATE OF OKLAHOMA,
Oklahoma County, ss:

I, L. J. Sartain, one of the reporters of the District Court of the Thirteenth Judicial District of the State of Oklahoma, do hereby certify that I reported the proceedings had on the trial of the above entitled case in shorthand, and that the above and foregoing contains a true, full, correct and complete transcript of all the evidence, both oral and documentary, introduced or offered on the trial of said cause.

Witness my hand this the 19th day of January, 1917.

____ ____,
Official Reporter.

106 Be it further remembered, that thereafter and on the same day, to wit, November 21, 1916, and at the close of all the evidence, the defendant herein requested the court to give to the jury the following instructions:

107 In the District Court of Oklahoma County, State of Oklahoma.

No. —.

DAN J. PERRY, Pl't'f,

vs.

J. M. DICKINSON, Receiver of the C., R. I. & P. Ry. Co.

Comes now the defendant and requests the court to give to the jury instructions numbered 1 to 5, incl., and in the event of the court's failure to give those instructions, or either of them, then to give instructions numbered 6 to 8, incl.

K. W. SHARTEL,
Attorney for Defendant.

107½ Defendant's Requested Instruction No. 1.

You are instructed that under the evidence in this case, together with all reasonable inference therefrom, the plaintiff has failed to prove a cause of action in his favor and against the defendant, under the allegations of the petition and the issues joined by the pleadings, and your verdict should be for the defendant.

Refused and exception allowed defendant.

EDWARD DEWES OLDFIELD,
Judge.

108 Defendant's Requested Instruction No. 2.

You are instructed that you will allow the plaintiff herein no damages by reason of the issuance to him of a service letter in viola-

tion of the statute of the State of Oklahoma because the said statute requiring the issuance of a service letter is unconstitutional and void and in violation of the Constitution of the State of Oklahoma, article 2, Sec. 7, thereof., providing that no person shall be deprived of life, liberty or property without due process of law.

Refused and exception allowed defendant.

EDWARD DEWES OLDFIELD,

Judge.

109 Defendant's Requested Instruction No. 3.

You are instructed that you will allow the plaintiff herein no damages for the issuance of a service letter in violation of the statute of Oklahoma, requiring the same, because said statute requiring the issuance of said service letter is unconstitutional and void and in violation of Article 2, Sec. 22 of the Constitution of Oklahoma, providing that every person may freely speak, write or publish his sentiments on all subjects and that no law shall be passed to restrain or abridge the liberty of speech.

Refused and exception allowed defendant.

EDWARD DEWES OLDFIELD,

Judge.

110 Defendant's Requested Instruction No. 4.

You are instructed that you will allow the plaintiff no damages by reason of the issuance to him of a false service letter in violation of the statute of Oklahoma requiring said issuance of a service letter for the reason that the statute of the state of Oklahoma is in violation of the Constitution of the United States and the Fourteenth Amendment thereof, and denies to this defendant due process of law and the equal protection of the law.

Refused and exception allowed defendant.

EDWARD DEWES OLDFIELD,

Judge.

111 Requested Inst. #5 inserted.

EDWARD DEWES OLDFIELD,

Judge.

Defendant's Requested Instruction No. 6.

You are instructed that if you find from the evidence that the plaintiff in this case at the time of his alleged injury, June 30, 1913, by his actions, helped to cause or contributed in any degree to his said alleged injury, as shown by the evidence in the case, you are instructed that he will not be entitled to recover any damages at your hands by reason of the issuance to him of said service letter as shown by the evidence.

Refused and exception allowed defendant.

EDWARD DEWES OLDFIELD,

Judge.

112 No. 7 Inserted in charge verbatim.

EDWARD DEWES OLDFIELD,

Judge.

No. 8.

You are instructed, gentlemen of the jury, that in arriving at your verdict you will not consider any evidence that has been submitted to you with reference to the settlement made between the plaintiff and the Rock Island Railway Company, as the same does not in any way tend to prove that the statements contained in the service letter were not true.

Refused and exception allowed defendant.

EDWARD DEWES OLDFIELD,
Judge.

No. 19145. D. J. Perry, Pl't'f, v. J. M. Dickinson, Receiver of The C., R. I. & P. Ry. Co., Def't. Defendant's Requested Instructions. Filed in District Court, Oklahoma County, Oklahoma, Sep. 21, 1916. Chas. Colt, deputy.

113 And thereafter, and on the same day, the court gave its instructions to the jury, said instructions, so given, being in words and figures as follows, to wit:

114 STATE OF OKLAHOMA,
Oklahoma County, ss:

In the District Court of said County and State.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver of the C., R. I. & P. Ry. Co., a Corporation, Defendant.

Instructions to Jury.

Gentlemen of the Jury:

This is an action instituted by the plaintiff wherein he seeks to recover judgment in the sum of $20,000.00. Plaintiff alleged in his amended petition filed in this case that he was employed, and had been so employed for about nine years as a switchman, by the C., R. I. & P. Ry. Co. That on August 18th, 1915, its Superintendent, H. F. Reddig, at Haileyville, Oklahoma, issued to this plaintiff a service letter, which letter recited, among other things, "Dismissed: Account responsibility in case of personal injuries to himself June 30th, 1913. Services otherwise satisfactory." That this plaintiff tried to secure employment of said railway and later applied in the year 1915, after the issuance of said service letter, to the yardmaster of the International & Great Northern Railroad, at Forth Worth,

Texas, and to the Yardmaster of the Texas Pacific at Fort Worth, for employment. That said yardmasters had authority to employ plaintiff as a servant for said railroads, and were at the time wanting experienced switchmen. That plaintiff exhibited his service letter and was unable to secure employment from any railroad company. That by said service letter plaintiff has been blacklisted, and was
115 denied employment because of the wording of said letter. That plaintiff has been in the railroad business for more than twenty five years and is now 51 years of age, and in good health except for an occasional hurting of his back. That he was receiving from the Chicago, Rock Island and Pacific Railway Company the sum of $105.00 a month for 31 days, and that he is now compelled to take such work as he can get, at $1.50 per day or less, and that he has a reasonable expectancy of life of 20 years.

Plaintiff further alleges that the issuance of said letter and the contents thereof does not truly state the facts, or give the true reason of his discharge and constitutes the proximate cause of the refusal of all other railroads to employ this plaintiff, and of the damages he has sustained by being prevented from obtaining employment. Wherefore plaintiff prays judgment as aforesaid.

To the petition of the plaintiff the defendant has filed his answer in which he denies generally the allegations of plaintiff's petition. Wherefore, defendant prays to be discharged.

2. The burden of proof is upon the plaintiff to establish all of the material allegations of his petition by preponderance of the evidence, by which *it* meant that evidence which is the more satisfactory, and which carries with it the greater weight.

116 3. You are instructed, gentlemen of the jury that even though you should find from the evidence that the service letter does not state the true cause for the discharge of the plaintiff from the service of the Chicago, Rock Island & Pacific Railway Company, nevertheless your verdict shall be for the defendant, unless you further find that the plaintiff has suffered damage by reason of his failure to obtain employment as a switchman on account of the statements in the service letter.

117 4. You are instructed that before you can award any damages to the plaintiff if any, the proof must show by a preponderance of the evidence; (1), that the contents of the said service letter was false, (2), that he was, at the time he alleges he sustained the said damages a man of ordinary physical ability, able to perform the work of an average man in the line in which he was making application and (3), that he was prevented from obtaining said employment for which he, at that time, was making application, by reason of the statements contained in the alleged false service letter, which has been set out and introduced in evidence before you, and if you find and believe from the evidence that the contents of the said service letter were true or that he was not a man of ordinary physical ability, able to perform the work of an ordinary individual in the line of employment in which he was making application for

work or that he was not prevented from obtaining employment from the parties to whom said application was made by reason of the statements contained in the said service letter herein, set out, you are instructed that the plaintiff has failed to prove his cause of action, as alleged, and your verdict should be for the defendant.

118 5. You are instructed that if the plaintiff was issued a service letter as alleged in the petition and that said letter contained a statement relative to the reason for plaintiff's dismissal, and said statement was untrue, and that because of the issuance of said letter containing said untrue statement said plaintiff has been denied employment by other railroad companies, then your verdict should be for the plaintiff in such sum as you find from the evidence he has been damaged as the direct and proximate result thereof.

Excepted to by defendant and exceptions allowed.

EDWARD DEWES OLDFIELD.

119 6. You are the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses, but you are bound by these instructions as to the law of the case. You are not at liberty to select any one or more of the instructions, to the exclusion of the others, but you must consider them all together as a whole, and as embodying the law applicable to this case.

7. After you shall have retired to your jury room you will select one of your number foreman and proceed with your deliberations. If you all agree upon a verdict you will cause the same to be signed by your foreman only; However, if you do not all agree but as many as three-fourths of your number do agree, those so agreeing will each sign the verdict individually, and return the same into court.

EDWARD DEWES OLDFIELD,
Judge.

Indorsements: 19145. Perry vs. Dickinson. Instructions to Jury. Filed Sept. 21, 1916. Filed in District Court, Oklahoma County, Sept. 21, 1916. James Beaty, Court Clerk. Chas. Colt, Deputy.

120 Be it further remembered, that thereafter and on the same day, to wit, November 21, 1916, the jury returned into open court their verdict in said cause, which said verdict is in words and figures as follows, to wit:

121 *Verdict—Civil.*

In the District Court of the Thirteenth Judicial District of the State of Oklahoma, Sitting in and for Oklahoma County.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver of the C., R. I & P. Ry. Co., Defendant.

Verdict.

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find for the plaintiff and fix the amount of his recovery at $3,000.

C. E. HIDLEBAUGH,
Foreman.
J. W. SCANLAN.
H. G. MADISON.
JAMES CAIN.
CHAS. W. RASH.
WM. C. THEIMER.
J. A. TULFOR.
L. H. GARTEN,
ARTHUR R. JONES,
W. A. JACKSON.
R. L. BARLOW, JR.

Indorsements: No. 19145. Verdict—Civil. Daniel J. Perry, Plaintiff, vs. J. M. Dickinson, Recv. C., R. I. & P. Ry. Co., Defendant. Filed Sept. 21, 1916. Filed in District Court, Oklahoma County, Oklahoma, Sep. 21, 1916. James Beaty, Court Clerk. By Chas. Colt, Deputy. Rec. J. 67, Page 509.

122 And thereafter, and on the same day, the court being fully advised in the premises did render judgment on said verdict in favor of the plaintiff and against the defendant, and said judgment was entered in and upon the journal of said court, which said judgment is in words and figures following, to-wit:

123 In the District Court of Oklahoma County, State of Oklahoma.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, Defendant.

Journal Entry.

On this the 21st day of September, 1916, came the plaintiff, by his attorneys, Vaught & Brewer, and also came the defendant, by his attorney, K. W. Shartel; said cause came on for trial in its regular order, before a jury of twelve (12) good men, who, being duly empaneled and sworn, well and truly to try the issues joined between plaintiff and defendant, and a true verdict render according to the evidence, and having heard the evidence, the charge of the court, and the argument of counsel, upon their oaths say:

"We the jury, empaneled and sworn in the above entitled cause do upon our oaths find for the plaintiff, and fix the amount of his recovery at Three Thousand Dollars ($3,000.00).

(Signed) C. E. HIDLEBAUGH,
Foreman.
J. W. SCANLAN,
H. G. MADISON,
JAMES CAIN,
CHARLES W. RASH,
WM. C. THEIMER,
J. A. TULFOR,
L. H. GARTEN,
ARTHUR R. JONES,
W. A. JACKSON,
R. L. BARLOW, JR."

It is therefore Considered, Ordered and Decreed by the court that said plaintiff have and recover from said defendant the sum of Three Thousand Dollars ($3,000.00), together with the costs of this case, for which let execution issue.

E. D. OLDFIELD,
Judge.

(Endorsed:) Filed in the District Court, Oklahoma County, Okla., 15 day of February, 1917. James Beatty, Court Clerk, by Cliff Myers, Deputy. Recorded, Proof read Book 68, page
124 360.

Be it further remembered, that afterwards and on the 23rd day of September, 1916, and within three days after the case

was tried, the defendant filed his motion for a new trial, which said motion, so filed, is in words and figures as follows, to-wit:

125 In the District Court Within and for Oklahoma County, State of Oklahoma.

No. 19148.

DANIEL J. PERRY, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, a Corporation, Defendant.

Motion for New Trial.

Comes now the defendant in the above entitled cause, and within three days after the rendering of judgment herein on the verdict of the jury and at the same term of court, and moves the court to set aside the judgment of the court and the verdict of the jury and grant to this defendant a new trial for the following reasons, which materially affect the substantial rights, of said defendant:

1. That there is no evidence to support the verdict.

2. That the verdict is contrary to law.

3. Excessive damages appearing to have been given under the influence of passion or prejudice.

4. Error of law occurring at the trial and excepted to at the time by the defendant.

5. The court erred in refusing to give defendant's requested instruction No. 1.

6. The court erred in refusing to give defendant's requested instruction No. 2.

7. The court erred in refusing to give defendant's requested instruction No. 3.

8. The court erred in refusing to give defendant's requested instruction No. 4.

9. The court erred in refusing to give defendant's requested instruction No. 5.

10. The court erred in refusing to give defendant's requested instruction No. 7.

11. The court erred in refusing to give defendant's requested instruction No. 8.

12. That the court erred in giving instruction No. 5 of its charge to the jury.

Wherefore, plaintiff prays judgment of the court.

K. W. SHARTEL,
C. O. BLAKE,
R. J. ROBERTS &
W. H. MOORE,
Attorneys for Defendant.

Indorsements: No. 19145. Daniel J. Perry, Pltf., vs. Jacob M. Dickinson, Deft. Motion for New Trial. Filed in District Court, Oklahoma County, Oklahoma, Sep. 23, 1916. James Beaty, Court Clerk, by Lennie Kune, Deputy.

Be it further remembered, that afterwards on the 27th day of November, 1916, the foregoing motion for new trial was overruled, and judgment overruling the same was rendered and entered in and upon the journal of said court, which said judgment is in words and figures as follows, to-wit:

In the District Court Within and for Oklahoma County, State of Oklahoma.

No. 19148.

DANIEL J. PERRY, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, a Corporation, Defendant.

Order Overruling Motion for New Trial.

Now on this 18th day of November, 1916, the above-entitled cause coming on for hearing on the defendant's motion for new trial, and the plaintiff appearing by his attorney, Ed S. Vaught, and the defendant appearing by his attorney, K. W. Shartel; and the court having heard argument in support of and against the granting of said motion and being fully advised in the premises, is of the opinion that the said motion should, in all things, be overruled.

It is therefore ordered and adjudged that the said motion for new trial be, and the same is hereby, overruled, to which action of the court the defendant excepted, which exceptions were by the court allowed.

It is further ordered and adjudged, for good cause shown, that the defendant have sixty (60) days in which to prepare his case-made, the plaintiff to have ten (10) days thereafter in which to suggest amendments, said case made to be signed and settled on five (5) days' notice in writing by either party.

EDWARD DEWES OLDFIELD,
District Judge.

129 Indorsements: 19145. Case No. 19145. In the District Court of Oklahoma County, Oklahoma. Daniel J. Perry, Plaintiff, vs. Jacob M. Dickinson, Receiver for The Chicago, Rock Island and Pacific Railway Company, Defendant. Order Overruling Motion for New Trial. Filed in District Court, Oklahoma County, November 27, 1916. James Beaty, Court Clerk, by Cliff Myers, Deputy. J. 67, Page 780.

130 Be it further remembered, that afterwards and on the 12th day of January, 1917, the defendant herein filed in said court his application for an extension of time within which to prepare and serve a case-made, which said application, so filed, is in words and figures as follows, to wit:

131 In the District Court of Oklahoma County, State of Oklahoma.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

JACOB M. DICKINSON, as Receiver of the Chicago, Rock Island and Pacific Railway Company, a Corporation, Defendant.

Application for Extension of Time in Which to Prepare and Serve Case-made.

Comes now the defendant, and, before the expiration of the extension of time heretofore granted, moves the court to grant him an extension of time of thirty days in addition to the time heretofore allowed, in which to prepare and serve a case-made, for the reason that the defendant has been unable to prepare and serve case-made in the time previously allowed.

K. W. SHARTEL &
C. O. BLAKE,
Attorneys for Defendant.

Indorsements: Case No. 19145. In the District Court of Oklahoma County, State of Oklahoma. Daniel J. Perry, Plaintiff, vs. Jacob M. Dickinson, as Receiver of The Chicago, Rock Island and Pacific Railway Company, Defendant. Application for Extension of Time in Which to Prepare and Serve Case Made. Filed in District Court, Oklahoma County, Oklahoma, Jan. 12, 1917. James Beaty, Court Clerk, by Cliff Myers, Deputy.

132 Be it further remembered, that thereafter and on the same day, to wit, January 12, 1917, the foregoing application for an extension of time within which to make and serve a case-made was granted, and judgment granting the same was rendered and entered in and upon the journal of said court, which said judgment was in words and figures as follows, to wit:

133 In the District Court of Oklahoma County, State of Oklahoma.

No. 19148.

DANIEL J. PERRY, Plaintiff,

vs.

JACOB M. DICKINSON, as Receiver of the Chicago, Rock Island and Pacific Railway Company, a Corporation, Defendant.

Order Granting Extension of Time in Which to Prepare and Serve Case-made.

Now on this 11th day of January, 1916, the application for an extension of time filed herein coming on for hearing, and the court being fully advised in the premises is of the opinion that said application should be granted.

It is therefore ordered and adjudged that the defendant have thirty (30) days in addition to the time heretofore allowed in which to prepare and serve case-made, and ten (10) days thereafter is allowed in which to suggest amendments, said case-made to be settled and signed on five (5) days' notice in writing by either party.

Done at Oklahoma City, Oklahoma, this 11th day of January, 1917.

EDWARD DEWES OLDFIELD,
District Judge.

Case No. 19145. In the District Court of Oklahoma, State of Oklahoma. Daniel J. Perry, Plaintiff, vs. Jacob M. Dickinson, as Receiver of The Chicago, Rock Island and Pacific Railway Company, Defendant. Order Granting Extension of Time in Which to Prepare and Serve Case-made. Filed in District Court, Oklahoma County, Oklahoma, January 12, 1917. James Beaty, Court Clerk, by Cliff Myers, Deputy. J. 68, page 200.

134 The above and foregoing sets out fully and correctly all the pleadings filed in said cause; all motions filed or made, and the rulings made thereon, and the exceptions of the plaintiff and defendant to such rulings; all the evidence offered, introduced or received upon the trial, and the exceptions of the plaintiff and defendant to the introduction and acceptance of such evidence; the requested instructions of the defendant and the exceptions of the defendant to the refusal of the court to give certain of said instructions; the court's instructions to the jury and the exceptions of the defendant to the giving of certain of said instructions; the verdict of the jury and the judgment of the court thereon, and the exceptions of the defendant thereto; and the same is a full, true, complete and correct case-made and transcript of all the pleadings, motions, evidence, findings, judgments and proceedings had in said cause.

135 In the District Court of Oklahoma County, State of Oklahoma.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, Defendant.

To the above-named plaintiff and his attorneys of record, Vaught and Brewer:

The above and foregoing case made is hereby tendered and served upon you and each of you as a true and correct case-made in the above-entitled cause, and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings had in the above-entitled cause, this 1st day of February, 1917.

C. O. BLAKE,
K. W. SHARTEL,
R. J. ROBERTS &
W. H. MOORE,
Attorneys for Defendant.

We, the undersigned attorneys for the above-named plaintiff, hereby accept and acknowledge service of the above and foregoing case-made on us, this 1st day of February, 1917.

VAUGHT & BREWER,
Attorneys for Plaintiff.

136 In the District Court of Oklahoma County, State of Oklahoma.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

JACOB M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, Defendant.

Waiver of Suggestion of Amendments to Case-made.

We, the undersigned attorneys of record for the plaintiff in the above entitled cause, hereby waive the right to suggest amendments to the above and foregoing case-made, and accept and acknowledge the same to be a true, complete and correct case made and a correct statement of all the pleadings, motions, orders, evidence, findings and proceedings had in the above entitled cause, and

We hereby waiwe notice of the time and place of the presentation of the above and foregoing case made to the Judge of the District Court before whom said cause was tried for settlement and signing, and hereby agree that the said case made be presented to said judge for settlement and signing, and that it may be settled, signed and allowed by said judge at any time and place that may suit his convenience so to do.

VAUGHT & BREWER,
Attorneys for Plaintiff.

137 In the District Court of Oklahoma County, State of Oklahoma.

#19145.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, Defendant.

Clerk's Certificate.

I, James Beaty, the duly elected, qualified and acting Court Clerk in and for the County of Oklahoma, State of Oklahoma, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above-entitled cause.

In testimony whereof, I have hereunto set my hand and seal of the court, this 19 day of March, 1917.

JAMES BEATY,
Court Clerk,
By CHAS. COLT,
Dept.

Filed in District Court, Oklahoma County, Oklahoma, Mar. 19, 1917. James Beaty, Court Clerk, by Chas. Colt, Deputy.

138 In the District Court of Oklahoma County, State of Oklahoma.

No. 19145.

DANIEL J. PERRY, Plaintiff,

vs.

J. M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, Defendant.

Judge's Certificate.

I, Edward Dewes Oldfield, the undersigned judge of the District Court in and for Oklahoma County, State of Oklahoma, hereby cer-

tify that the foregoing was presented to me as a case made in the above entitled cause, the defendant appearing by one of his attorneys of record and the plaintiff having waived notice of said signing and having waived the right to suggest amendments thereto, and I now settle and sign the same as a true and correct case made and direct that it be attested and filed by the Clerk of said court.

Witness my hand at Oklahoma City, in Oklahoma County, Oklahoma, this 19th day of March, 1917.

EDWARD DEWES OLDFIELD,
District Judge.

Attest:
[SEAL.]

JAMES BEATY,
Court Clerk,
By CHAS. COLT,
Deputy Court Clerk.

139 In the Supreme Court of the State of Oklahoma.

No. 9118.

JACOB M. DICKINSON, as Receiver of the Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

Waiver of Issuance and Service of Summons.

The defendant in error in the above entitled cause, by his attorneys the undersigned, hereby enters his appearance in the above entitled cause in the Supreme Court of the State of Oklahoma, and hereby waives the issuance and service of summons in error.

VAUGHT & BREWER,
Attorneys for Defendant in Error.

Filed in Supreme Court of Oklahoma, May 15, 1917. William M. Franklin, Clerk.

140 [Stamped:] Filed in Supreme Court of Oklahoma, Aug. 28, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 9118.

J. M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

Petition for Substitution as Plaintiff in Error.

Comes now The Chicago, Rock Island and Pacific Railway Company and shows to the court that it is a consolidated corporation existing under the laws of Illinois and Iowa and was on April 20, 1915, the owner of, and engaged in operating, lines of railroad in the State of Oklahoma; that on said date Jacob M. Dickinson and H. U. Mudge were, by the United States District Courts for the Northern District of Illinois and for the Western District of Missouri, appointed receivers of said railway and all other property of the said company and immediately took possession thereof and proceeded to operate the said lines of railway as such receivers, under the order of said courts, until the 30th day of September, 1915, on which date said H. U. Mudge resigned, and thereafter the said Jacob M. Dickinson, as sole receiver, continued to retain possession of the said properties and operate the said railroad until the 24th day of June, 1917, on which date he was discharged from the possession and control of said railway and other property, and the same were, under the decree of said courts, thereupon restored to the possession and control of said Railway Company; that by
141 the terms of the said decree, the said Railway Company was authorized and required to prosecute or defend all suits, actions and proceedings to which the said receiver, or either of them, was a party, and, subject to certain conditions in the said decree stated, to satisfy all claims against the said receivers, and the Company, therefore, has become the real party in interest in the above entitled action or proceeding.

Said The Chicago, Rock Island and Pacific Railway Company, therefore, moves the court to enter an order permitting it to be substituted for said Jacob M. Dickinson, as receiver of The Chicago, Rock Island and Pacific Railway Company, as plaintiff in error herein and that it be permitted to file a supplemental petition in error and to prosecute this appeal as the real party in interest.

C. O. BLAKE,
R. J. ROBERTS,
Attorneys for the Chicago, Rock Island and Pacific Railway Company.

STATE OF OKLAHOMA,
County of Canadian, ss:

R. J. Roberts, of lawful age, being first duly sworn, upon his oath, states that he is an attorney for The Chicago, Rock Island and Pacific Railway Company and that he has read the above and foregoing document and knows the contents thereof and that the same are true, as he verily believes.

R. J. ROBERTS,
Attorney for the Chicago, Rock Island and Pacific Railway Company.

Subscribed and sworn to before me this 27th day of August, A. D., 1917.

[NOTARY SEAL.] W. T. MALONE.
Notary Public.

My commission expires January 9th, 1921.

142 And thereafter, to-wit: on the 2nd day of October, 1917, in the Supreme Court of the State of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, July Term, 1917, October 2nd, 1917, Twenty-first Judicial Day.

9118.

J. M. DICKINSON, Receiver, etc., Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

And now on this day the above cause comes on for hearing before the court upon the petition for substitution as plaintiff in error, filed in said cause on Aug. 28, 1917, and it is ordered by the court that The Chicago, Rock Island and Pacific Railway Company, be substituted for said Jacob M. Dickinson, as receiver of The Chicago, Rock Island and Pacific Railway Company, as plaintiff in error herein, as per petition for substitution filed in said cause.

143 And thereafter, to-wit: on the 13th day of June, 1918, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, June Term, 1918, June 13th, 1918, Third Judicial Day.

9118.

J. M. DICKINSON et al., Plaintiffs in Error,

vs.

D. J. PERRY, Defendant in Error.

And now on this day the above cause is submitted and it is ordered by the court that defendant in error be given 10 days in which to file brief in said cause.

144 And thereafter, to-wit: on the 27th day of May, 1919, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, April Term, 1919, May 27th, 1919, Eighth Judicial Day.

9118.

J. M. DICKINSON et al., Plaintiffs in Error,

vs.

D. J. PERRY, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the Court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Johnson, J.

145 [Stamped:] Filed in Supreme Court of Oklahoma May 27, 1919. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 9118.

J. M. DICKINSON, Receiver for the Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error,

vs.

DANIEL J. PERRY, Defendant in Error.

Syllabus.

1. Where a railway company dismissed from its service an employee who had served the company for 9 years in the capacity of switchman in its yards, and while in the discharge of his duties, was thrown from a box car by reason of a defective brake and received injuries for which the company voluntarily compensated him, and on being discharged from the hospital where he had been sent for treatment by the agents of the company, the physician in charge gave him a letter addressed to the yardmaster of the company where the employee had formerly worked for the company, which letter stated: "In the case of D. J. Perry injured at Shawnee, Oklahoma, on June 30th, 1913, the injured party was able to resume work on the day of his return. He leaves Chicago Dec. 5, 1913." And in a few days after his return he presented himself to such yardmaster and offered to resume his former duties and exhibited to him such letter, at the time, the yardmaster saying, "Dan, you are out of service, you are ineligible, and you will have to see the Superintendent." And that he thereafter, saw the Superintendent and asked for re-employment, and was, by said Superintendent informed that according to the Doctor's report he couldn't do anything for him, and that thereafter, he asked the Superintendent for a service letter, who, in a few days thereafter, sent him a letter as follows:

146 "That Daniel Jackson Perry has been employed on the Indian Territory Division of the Chicago, Rock Island and Pacific Railway Company as switchman from Nov. 1st, 1904, to July 1st, 1913.

Dismissed: Account responsibility in case of personal injury to himself June 30th, 1913.

Services otherwise satisfactory.

H. F. RETTIG,
Supt."

And thereafterm he again applied to the Superintendent of said company for re-employment and was again informed by the said Superintendent that he was incapacitated according to the Doctor's report: That he thereafter applied for work as switchman to the officers who were empowered to hire switchmen, of four other railway companies, each time exhibiting his service letter and each time failing to receive employment; and he thereafter filed suit against the Receiver of such company so issuing said service letter, for damages, making the same a part of his petition, and by proper averments, charged that the language used in the said service letter stating why he was dismissed from the service of the railway company, was untrue, and that as a result of the untruthful/ness thereof, he had been blacklisted, and on account thereof, refused employment by other railway companies, and that he could never secure employment from any railway company on account thereof, and as a direct and proximate result of said blacklisting, he had been damaged in the sum of $20,000.00 held:

(*a*) That the truthful/ness or untruthful/ness of the statement contained in such service letter was an issue properly joined by the pleadings, and was a proper question for decision by the jury, and:

(*b*) That where special damages were alleged by the plaintiff and competent testimony offered in support thereof, that the questions of the truthful/ness or untruthful/ness of the statement contained in the service letter as to why the plaintiff was dismissed from the service of the railway company and the measure of his damages were correctly submitted to the jury by the court, and the jury thereafter returned a verdict in favor of the plaintiff, and assessed his damage in the sum of $3,000.00 and the trial court approved the same, the judgment should be affirmed.

2. Section 2769 Rev. Laws of Okla. 1910, requiring that public service corporations give to employees discharged or leaving the service, a letter stating the nature of the service rendered, and the cause for which the employee was discharged or quit the service, does not deny to such public service corporations due process of las, and is not violative of Sec. 7, Art. 2, of the Constitution of Oklahoma, nor of the Constitution of the United States, or the fourteenth Amendment.

3. Requiring public service corporations to give a letter as designated in the foregoing paragraph of the syllabus, commonly known as a service letter is a requirement which affects the public welfare and is a valid exercise of the police power of the state.

147 4. The requirement that a public service sorporation shall give a service letter, as described in the 2nd paragraph of the syllabus herein is not a violation of Sec. 22, Art. 2, of the Constitution of Oklahoma, guaranteeing the right of free speech.

5. Where there is competent evidence reasonabiy tending to support the verdict of the jury and the instructions of the court to the jury fairly state the law arising upon the issue raised by the pleadings and the evidence, the judgment rendered upon the verdict will not be disturbed by the Supreme Court.

148 Error from the District Court of Oklahoma County, Oklahoma.

Edward Dewes Oldfield, District Judge.

Affirmed.

C. O. Blake, K. W. Shartel, R. J. Roberts and W. H. More, Attorneys for Plaintiff in Error.

Vaught & Brewer, Attorneys for Defendant in Error.

Opinion of the Court by

JOHNSON, *J.*:

This is an appeal from the District Court of Oklahoma County. Daniel J. Perry, Defendant in error, plaintiff below, on the 11th day of March, 1916, commenced this action against J. M. Dickinson, Receiver for the C., R. I. & P. Ry. Co., a Corporation, plaintiff in error, defendant below, by filing his petition which was afterwards amended to recover the sum of $20,000.00 damages.

For convenience the parties will hereinafter be referred to as plaintiff and defendant, as they respectively appear in the court below.

The amended petition of the plaintiff is quite lengthy, therefore, only the substance of the same will be stated.

149 He alleged that the defendant was Receiver of the Ry. Co., named. That on the 30th day of June, 1913, the plaintiff was in the employ of said Ry. Co., in the city of Shawnee, Oklahoma, as switchman; That on said date he was in discharge of his regular duties, and that in setting the brake on a box car received injuries on account of a defect in the brake and its appliances, which defect was known to the agents and employees of the railway company, or could have been known with the exercise of proper diligence; That he was severely injured, describing his injuries, and that on account of same he was taken to the railway company's hospital in the city of Shawnee where he was kept for two months, and, for another month he spent his time at the hospital and at his home going back and forth; And that thereafter he was advised by the physicians and representatives of the railway company that he would be ready for work within a very short time; That he entered

into a settlement with the railway company, for the damages he had sustained because of said injuries, and executed a release to the company for the same; That after he had done so, he was taken worse and said railway company, at its own expense, carried him to the hospital of said company, in the city of Chicago, where he was treated for, approximately, one month, by a physician of said company; That thereafter he returned to Shawnee on or about the 17th day of December, 1913; That he was weak and run down and remained at his home for approximately 60 days; That when he left the hospital in Chicago he was given a certificate directed to the General Yardmaster of said railway company at Shawnee, Oklahoma, advising said yardmaster that he was able to resume his work on his return to Shawnee which certificate he attached to his Amended Petition causing the same to be marked, "Exhibit "A." That on his return to Shawnee he reported to the yardmaster of the company and was advised that he was out of service because he was ineligible for duty; that the report of the doctor showed he was incapacitated, and to see the Superintendent; That he saw the Superintendent, who informed him he was incapacitated according to the doctor's report, whereupon he exhibited the certificate marked Exhibit "A," the Supt., remarking, "I have got nothing like that in my office."

150 Following this, the plaintiff makes specific allegations in his Amended Petition which are as follows:

"Plaintiff alleges that said railway company refused to re-employ this plaintiff, although this plaintiff continued to apply for work from December 1913, until August, 1915.

On August 18th, 1915, the said railway company, through its supt., H. F. Reddig at Haileyville, Oklahoma, issued to this plaintiff a Service Letter, a copy of which Service Letter is hereto attached marked Exhibit "B" and made a part of this petition; That after the issuance of said Service Letter, which Service Letter stated, after reciting the length of time which this plaintiff has been employed by said railway company, "Dismissed; Account responsibility in case of personal injury to himself, June 30th, 1913. Services otherwise satisfactory." This plaintiff tried again to secure employment from said railway company and he was advised by those having the authority to employ him and by various employees of said Railway Company, that he could never secure employment from any railroad company under that Service Letter, as it meant that he was blacklisted, and meant also that he was personally responsible for his own accident, and that he could never secure employment from another railroad company."

That in the year 1915, he applied for employment at Ft. Worth, Texas, to the General Yardmaster of the International & Great Northern Railway Company, and that he exhibited his Service Letter marked Exhibit "B" whereupon the Yardmaster replied,

"We can't use you on account of this letter."

That thereafter he applied to the General Yardmaster of the Texas and Pacific Railway Company at Ft. Worth, Texas, to whom

he exhibited his Service Letter whereupon the Yardmaster replied, "Can't use you on that letter."

Plaintiff alleges that he was 51 years of age, and had been in the railroad business for more than 25 years; That he was in good health except for an occasional hurting in his back, but that he worked regularly at some kind of employment; That at the time of his injury he was receiving from the railway company $105.50 per month, for 31 days; That he is now compelled to take such work as he can get at $1.50 per day or less; that he spent the best years of his life in preparing and equipping himself as a railroad man; That he is an experienced and trained brakeman and switchman; but that because of the issuance of said Service Letter by the railway company, cannot procure employment either from defendant company or from any other railroad company, that by said Service Letter
151 he has been blacklisted and been denied employment by other railroad companies because of the wording of said letter; That by and under the American Mortality Table, his expectancy is approximately 20 years; and that the compensation for switchmen or brakemen is not less than $100.00 per month; That said Service Letter did not truly state the facts or give the true reason for his discharge; that his failure to obtain employment from other railroad companies was due directly and proximately to the issuance and contents of said Service Letter; That said Letter upon its face charged the plaintiff with being responsible directly for the injuries which he sustained on June 30th, 1913, and that said statement is untrue and was known to be untrue by the Railway Company, and that the Railway Company admitted its liability for said accident, by making settlement with the plaintiff for such injuries by caring for him in its hospital both in Shawnee and Chicago, and rendering professional services free to him.

The following is a true copy of Exhibits "A" and "B" with all endorsements thereon:

EXHIBIT "A."

Rock Island Lines,

Surgical Department.

Chicago, Ill., Dec. 5, 1913.

Mr. C. C. Fettig,
Gen'l Yardmaster,
Shawnee, Oklahoma.

DEAR SIR:

In the case of D. J. Perry injured at Shawnee, Oklahoma, on June 30th, 1913, the injured party was able to resume work on the day of his return. He leaves Chicago Dec., 5, 1913.

Yours truly,

FERD. ENGELBREESTON, M. D.,
Local Surgeon, Chicago, Ill.

EXHIBIT "B."

Haileyville, Oklahoma,

August 18th, 1913.

This is to certify: That Daniel Jackson Perry has been employe
on the Indian Territory Division of the Chicago, Rock Islan
152 and Pacific Railway Company as switchman from Novemb
1st., 1904, until July 1st., 1913.

Dismissed: Account responsibility in case of personal injury t
himself June 30th, 1913. Services otherwise satisfactory.

H. F. REDDIG,
Superintendent.

Rock Island Lines, Office of Superintendent, Aug. 19, 191
Haileyville, Oklahoma, Indian Territory Division.

The defendant answered admitting his receivership, then filed b
general denial, then answered specifically as follows:

"This defendant avers that said statute of the State of Oklahom
upon which plaintiff bases his action, and for which plaintiff ask
damages by reason of the breach of the same by this defendant
was at date of its passage and approval and at the date of the is
suance of the service letter set out by the plaintiff therein as Exhibi
"B" was unconstitutional and void, and deprived this defendant o
due process of law and the equal protection of the law as guarantee
to him under the 14th Amendment of the Constitution of the Unite
States, and Section 7 of Article 2 of the Constitution of the State o
Oklahoma, in denying to this defendant freedom of speech and th
press, including the right to remain silent."

The case was tried to a jury who returned a verdict in favor of th
plaintiff for $3,000.00 upon which verdict the court rendere
judgment.

A timely motion for new trial was made by the defendant, which
being overruled by the court, the defendant excepted, appealed t
this court and assigns error.

The plaintiff testified that he was 51 years old, resided in Shawne
Oklahoma, his occupation was that of railroading and had bee
since 1889; that he had been in the employment of the Rock Islan
Railroad Company for 9 years; that previously he ha
153 worked for the K. C. F. S. & M., Illinois Central and Mobil
& Ohio railroad companies; that he began work for the Roc
Island Railway Company in 1904 at Shawnee, Oklahoma, and con
tinued until 1913, in the capacity of switchman; That he never ha
suit against the company to recover for personal injuries, and tha
he was injured about June 30th, 1913, while in the discharge of hi
duties as employee of the company in the Shawnee yards in sub
stantially the following manner:

"We were switching up there by the house track and was kicking a car, the fireman and the man who was following the engine, kicking a car in and as I was working the field it was my duty to catch this car. I got on this car and set the brakes and when I had set the brake I started to get off and never took one of my hands off the brake wheel, and the dog slipped out of the ratchit and let the wheel reverse and the way I was sitting I fell from ther- to the ground on the end of some ties."

It seems that there was a hole that had worn too much and it gave the dog too much play. He never used that particular car before; that he fell of- the car to the ground; that after the injury he went home and stayed there 4 days and nights and then he was carried to the hospital in Shawnee by the railroad Company's doctor. He stayed there and at home 4 or 5 months back and forth; He lived about a mile from the hospital and the railway company's doctor would send him back and forth in a cab or hack, the orders being given by the company's physician, Dr. Blankendiffer.

The court sustained the motion by defendant's counsel to strike out the testimony as to the condition of the brake and instructed the jury to disregard it to which plaintiff through his counsel excepted; That the company settled with him for his injuries through its claim agent, Mr. Charles Hardcastle, after he was released from the hospital in Shawnee; That he took a backset and the company through Mr. Hardcastle gave him transportation to the hospital in Chicago, where he remained about a month, the company paying his expenses, he was not out a cent; That he left the Chicago hospital in December at which time he was given by the surgeon in charge a paper which he identified as plaintiff's exhibit "A" which was
154 offered in evidence over the objection of the defendant; that he returned to Shawnee some time in September and showed Exhibit "A" to the defendant's yardmaster, Mr. Rettig; That Mr. Rettig handed *it* back to him, said he could not employ him because I was incapacitated, I said, "There is the report of the doctor that says I am able for duty and this is the last doctor that had his hands on me," That when I got back from Chicago, and as soon as I picked up a little and felt like I was strong enough, I went to the Yardmaster and told him that I was ready for duty and showed him that letter and he said, "Dan, you are out of service," I said, "What's the cause, Pete," and he says, "ineligible, you will have to see the superintendent."

He made application for employment when he was informed by the yardmaster, "Pete" that he was out of service. I says, "What is the matter, Pete," and he says, "You are ineligible," I says, "What will we do about it," and he said, "You will have to see Mr. Rettig, the Superintendent;" That he saw Mr. Rettig, who said, "Dan, I have been busy today and I will see you the next time I come in." When he came in again I saw him and talked awhile, and he said, "Dan, I can't do anything for you, the reason I put you off was to look up the doctor's reports and according to the doctor's reports I can't do anything for you." I then asked for a service letter two

or three times, and he said he would give me one. He identified Exhibit "B" and said it was the letter given him, testified that he had known Mr. Rettig about 12 years, was acquainted with his signature that long, and had seen him write his name frequently and that the Service Letter contained Mr. Rettig's signature. Exhibit "B" was then read to the jury without objection. He testified that he afterwards applied to the defendant company's yardmaster at Shawnee, a Mr. Ray, for employment, the man who employs swtichmen. He applied for the position of switchman, and that he was not employed; Mr. Ray refused to employ him; That he exhibited to him his Service Letter and was refused employment; That he made settlement for his injuries with Mr. Charles Hardcastle, claim agent for the defendant company who told me that he had made investigation as to the condition of the brake on the car, and as there was a defficiency in the brake they were ready to settle
155 for it. That he had been to doctors in Shawnee, Dr. Rowland, the trainmen's doctor, and Hughes and Herrington, the switchmen's doctor, and that Dr. Blankendiffer waited on him all the time; That Dr. Blankendiffer was the company's doctor, and that he told him that he would be able to go to work in a couple of months.

At the time I applied for work to the yardmaster at Shawnee, he said, "The doctors have got you, Dan, we can do nothing for you." This was before I got the Service Letter and for me to see the Superintendent.

The plaintiff testified that after he was refused employment by the Rock Islabd Railway Company that he applied to a Mr. J. F. Ingram, yardmaster of the T. & P. Railway Company at Ft. Worth, Texas, and gave him his Service Letter, Exhibit "B" and that he failed to get employment, and also, to the I. G. & N. Railway Company at Ft. Worth, Texas, he showed his service letter and failed to get employment, also, to the Ringling Road at Ardmore, Oklahoma, and showed his Service Letter to the Supt., who read it, and he failed to get employment, also, to the Katy Railway Company at Oklahoma City, to Mr. Gardner, the Trainmaster and showed him the Service Letter, that he read it, and that he failed to get employment, and that during all this time he was able to do the class of work that he had done for the Rock Island Railway Company, and that he was familiar with the way that employees severed their connection with the Railway Companies and secured employment with them, and that when one left the Railway company of his own volition and desired to secure employment from another railway Company it was necessary to get a Service Letter showing the date he commenced and the dat- he quit, and that when he secured employment with another company it was necessary to show his Service Letter, and when he went to work for the Rock Island Company he had a Service Letter and showed it before he was employed. He also testified that in setting the brake upon the box car at the time he was injured, he did it in the same way that he had always handled brakes on similar occassions.

156 It was admitted in the record that the American Mortality Table showed that the expectancy of a person 51 years of age, is slightly in excess of 20 years.

That was in substance, all the testimony of the plaintiff upon the trial at the conclusion of which the defendant demurred to the evidence of the plaintiff which was by the court overruled and excepted to by the defendant, whereupon the defendant called as witness, H. F. Rettig, who testified that he was the Superintendent of the Rock Island Railway Company, had been in the railroad business 21 years, and Superintendent of the Rock Island for 5 years, and that before he became Superintendent for the Rock Island Company he was train master for said company; that he was familiar with the plan of hireing employees for the Rock Island Company, and that he had never issued an order requiring service letters from the men who sought employment, and that it was not the policy of the Rock Island Company. That it was the policy of his company not to hire men for the first time to do switching anf braking who were over the age of 45 years; that the- did not dismiss men from their service who had attained the age of 45 years while employed.

Mr. C. B. Wildman, who testified that he lived in Van Buren, Ark., and that he was working for the Iron Mountain Railway company in the position of Superintendent; That the company had a policy restricting the age at which switchmen would be employed for the first time, and that he did not employ men over the age of 45 years; that was the general policy of his road, and that he did not demand service letters of applicants for employment.

The next witness called by the defendant was J. M. Chandler, who testified that he lived at Springfield, Mo., and that he was Inspector of transportation for the Frisco Railway Company, and that he had held the positions of trainmaster and superintendent and various other minor positions. Been in the railroad business 19 years. That the Frisco had a policy with reference to the employment of switchmen and did not employ them for service beyond the age of 45 years; and that it did not require service letters of persons making application for employment.

157 Mr. G. S. Baxter, was next called by the defendant who testified that he lived at Shawnee, Oklahoma, and that he was a physician and a graduate from the Memphis Hospital Medical College, and was acquainted with Dan Perry, had known him for 6 or 7 years; that 6 or 7 years ago he treated him for lobular pneumonia, and that he treated him about Aug. to Sept., 1913, and made an examination and found him suffering with the disease, arterial sclerosis, which is a hardening of the blood vessels and that a patient suffering from that disease grew progressively worse; that it was a disease of old men but young men may have that condition; that he has not examined Mr. Perry since.

The defendant next called Dr. T. D. Rowland whose testimony in substance was the same. He had known Mr. Perry probably 20 years. Dr. E. E. Rice, who lived at Shawnee, his testimony was in substance the same. The witness, H. F. Rettig, was not inter-

rogated concerning the issuance of the purported service letter by him to the plaintiff.

The defendant in his petition in error makes the assignment:

"That the trial court erred in overruling the motion of said plaintiff in error for new trial."

His first specification of error in the foregoing assignment is:

"That the court erred in failing to direct a verdict for the defendant as requested, because the proof failed to show that the service letter given the plaintiff did not truly state the cause of his discharge."

We hold that there is no merit in this contention, as we find that the testimony of the plaintiff tends strongly to show affirmatively that the service letter did not truly state the cause of the discharge, and the testimony offered by the defendant negatively tended to prove the same thing, in that it practically all tended to show that the real cause of the plaintiff's dismissal from the service of the railway company, was, because he was physically incapacitated for the duties of switchman, and that the trial court's refusal to give the peremptory instructions was not error. M. V. & G. Ry. Co. v. Davis, 154 Pac. 503; Menton v. Richards, 153 Pac. 1177; Mountcastle v. Miller, 166 Pac. 1057.

The defendant's second specification of error is:

"The court erred in failing to direct a verdict for the plaintiff as requested because the service letter statute in which recovery was sought, violated the provisions of the Constitution of Oklahoma as set forth in Sec. 7 and 22, Art. 2, because it denied to the defendant, federal rights guaranteed under the Constitution of the United States, and the Fourteenth Amendment thereof."

158 We are, therefore, called upon to determine the constitutionalty of the Service Letter Law, to-wit: Section 2769, Rev. Laws 1910, which reads:

"Whenever any employee of any public service corporation, or of a contractor, who works for such corporation, doing business in this state, shall be discharged or voluntarily quits the service of such employer, it shall be the duty of the superintendent or manager, or contractor, upon the request of such employee, to issue to such employee a letter setting forth the nature of the service rendered by such employee to such corporation or contractor and the duration thereof, and truly stating the cause for which such employee was discharged from or quit such service; and if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employee, when so requested, or shall wilfully or negligently refuse oe fail to state the facts correctly, such superintendent, manager or contractor shall be deemed guilty of a misdemeanor and upon the conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the county jail for a period of not

less than one month and not exceeding one year. Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employee. No printed blank shall be used, and if such letter be written upon a typewriter, it shall be signed with pen and black ink, and immediately beneath such signature shall be affixed the official stamp, or seal of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters used upon such piece of paper, except as are plainly essential, either in the date line, address, the body of the letter or the signature and seal or stamp thereafter, and no such letter shall have any picture, imprint, character, design, device, impression or mark, either in the body thereof or upon the face or back thereof, and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above described."

The presumption *os* in favor of the constitutionality of the statutes, and this court, wherever possible to do so, will uphold the constitutionality of an enactment of the legislature. In M. K. & T. Ry. Co. vs. Walker, County Treas., et al., 54 Okla. 359, 362; 154 Pac. 343, it is said:

"The act being susceptible of a construction which will uphold it, the courts will so construe it. C. R. I. & P. Ry. Co. vs. Beatty, 34 Okla. 321; 118 Pac. 367; 126 Pac. 736; 42 L. R. A. N. S. 984, St. L. & S. F. Ry. Co. vs. Zalondek, et al., 28 Okla. 746; 115 Pac. 867."

Lewis Sutherland on Statutory Construction, Sec. 82, states the rule followed by the co*y*rts in construing statutes, as follows:

"Their presumption is in favor of the validity of the act of the legislature, and all doubts are resolved in support of it. 'In determining the constitutionality of an act of the legislature, courts always presume in the first place, that the act is constitu-
159 tional. They also presume that the legislature acted with integrity and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution. The legislature is a co-ordinate department of the government, invested with high and responsible duties, and is must be presumed that it has considered and discussed the constitutionality of all measures passed by it.' The unconstitutionality must be clear or the act will be sustained."

It is not therefore necessary for this court to inquire into the necessity of the legislation or the motives which prompted the enactment of the law contested in this court. The legislature is itself the judge of the conditions which warrant legislative enactments and these laws are only to be set aside when they involve such palpable abuse of power, and lack of reasonableness to accomplish a lawful end, that they may be said to be merely arbitrary and capricious and hence out of place in a government of laws,

and not of men and irreconcilable with the conception of due process of law. McGehee on Due Process of Law p. 306. A legislative enactment will not be declared invalid by the courts unless such enactment is arbitrary and unreasonable.

Whether or not the custom still prevails, it appears that at one time it was the rule among railway companies and other corporations to keep a list of employees who were discharged or left the service and to furnish such list to other railway companies and employers. Any reason which might be agreed upon among employers was sufficient for "blacklisting" employees, thereby possibly preventing their again securing employment in their accustomed occupation or trade. It was this abuse among other things, which caused the legislatures of various states to enact laws declaring blacklisting unlawful, and requiring corporations to give a letter to employees discharged or leaving the service, setting forth the reasons for the discharge of the employee or of his leaving the service and the nature of the service rendered by the employee.

Labatt, in his work, "Master and Servant" Vol. 5, Sec. 2031, in discussing legislation of this character, says:

160 "It is apprehended that any harm which may result from a moderate limitation of the rights of employers in this respect will be slight in comparison with the evil consequences which are certain to follow if that practice so essentially repugnant to the free institutions of Anglo-Saxon civilization as that of systematice "blacklisting" is allowed to remain unregulated. The enevitable effect of such a practice must be the subjection of a constantly increasing number of employees to disabilities and restrictions scarcely less oppressive than those to which servants were formerly subjected in England by statutory provisions long since obsolete."

As illustrative, "In 5 Eliz. Chap. 4, Sec. 10, it was enacted that a servant in any of the various occupations specified should be liable to imprisonment of he departed from the city or parish in which he had been employed, without obtaining an official testimonial stating that he was licensed to depart from his master, and at liberty to serve elsewhere."

It is suggested by the author that:

"It is manifest that, if the practice of "blacklisting is left unchecked, the employers of our own times will be able, by private compacts, to place large bodies of employees in a position analogous to that which would result from the operation of such a statute."

The idea of requiring employers to give employees leaving their service, a letter showing the character of work performed while in their service, is not a new one. The common law recognized a moral obligation resting upon the employers to give a "character" to servants leaving the employment of their masters, but no legal obligation of this nature existed until laws touching these matters were enacted.

Labatt in his "Master and Servant" Vol. 5, Sec. 2013, 2014, says:

"The doctrine of the English and American courts is that a master is morally, but not legally, bound to give a character to the servant when he is discharged from or leaves the employment. * * * The extreme severity with which the rule may sometimes operate has recently been shown in a very striking manner by its application in that class of cases in which several employers in a certain line of business entered into a mutual agreement that no person who has previously been in the services of one of them shall be hired by any other, unless he can produce what is known as a "character card" from his last employer. * *. * In some jurisdictions the common-law rule has been modified by statutes applicable, either to employers generally, or to employers of a particular class, and there seems to be good reason to anticipate that enactments of this type will be greatly multiplied in coming years. The desirability of thus supplying the deficiencies of the common law cannot be consistently disputed by any one who is of the opinion that it is proper to protect employees by legislation against "blacklisting." Manifestly the refusal to give a character may often be virtually the equivalent of "black-listing" so far as regards the injury inflicted on the servant."

161 The legislation is attacked herein upon the grounds that it is in violation of Section 7, of Art. 2, of the Constitution of Okla., which provides that no person shall be deprived of life, liberty or property without due process of law, that it is in violation of Sec. 22, Art. 2, of the Constitution of Oklahoma in that it denies the right of free speech; and that it is in violation of the Constitution of the United States and the Fourteenth Amendment thereof, in that it denies to the defendant due process of law and the equal protection of the law.

The right of contract may be arbitrarily interfered with and comes within the protection of the provisions of the Constitution of the State of Oklahoma, and the United States, protecting the life, liberty and property of the citizens of the state. But the right of contract is not an absolute and unyielding right. It is subject to limitations in the interest of the public welfare. Thus, legislation has been enacted to prevent the purchase or sale of lottery tickets. Minors are denied the right to make contracts except for the necessities of life. Corporations are denied the power to make contracts releasing themselves from negligence. The Constitution of the state prohibits the granting *pf* perpetual or exclusive franchises within municipalities of the state. Sec. 5, Art. 18, Constitution of the State of Oklahoma. Legislation has been enacted limiting the number of hours per day that corporations may contract with workers for employment. The list of laws which have been passed limiting the power of contract in the interest of public health, safety and welfare, might be continued, but it is not necessary to illustrate the point.

It is assumed by those who challenge the constitutionality of the law requiring employers to give service letters to their employees, that the utmost freedom of contract now prevails and that the em-

ployer deals with men who are at liberty to accept employment or not, as they like. During times of prosperity and when there is a scarcity of labor, this, in many instances, may be true, but ordinarily the individual employee is not in an equality with his employer so far as accepting or rejecting terms of employment
162 is concerned. The average employee is a man of limited means, depending upon his day's wages for sustenance for himself and family. He is compelled to accept conditions as he finds them and to make such wage bargains as are offered him. It is only through the efforts of employees as organizations, through the policy of far-seeing employers, or through legislative enactments that a general amelioration of conditions is brought about. Employers and employees do not, therefore, deal on terms of absolute equality, and liberty of contract exists often only in theory. Hence, reasonable limitations is the interests of public health, safety and welfare may be thrown about the contracts which employers make with their employees.

There is nothing in the law contested, which attempts to prevent a corporation from hiring whomsoever it pleases, or from discharging its employees when it sees fit. Neither is there anything in the law which requires a corporation to give a letter of recommendation to employees discharged or leaving its service. All that is required is a statement of the employer showing the character of services rendered by the employee and the reason for his leaving the service of his employer. It is a certificate which, when the facts are favorable to the employee, may assist him in securing other work along the line of his trade, and is a certificate to which he feels that in justice he is entitled.

The question of giving a certificate is so general that in our opinion objection would not be raised by railway companies to giving employees a certificate if this character were it not for the misconception which existed in the earlier days of the common law in reference to the treatment of servants by masters, and the earlier decisions of the courts based on the laws which reflected conditions then, but which no longer exist. There is nothing unusual or revolutionary in requiring the employer to gove a certificate to the employee leaving his service, showing the time he has been employed, and the character of service rendered. A certificate is the usual and customary mentod to indicate what has or has not been done. 11 C. J. 76. Thus we have certificates of courts, public officials and persons transacting business. Schools and colleges give
a certificate or a diploma to those who have completed a re-
163 quired course of study. Persons who have passed examinations are entitled to a certificate showing their competency to enter a profession. Even those who fail in examinations are furnished with a statement of grades made. Soldiers leaving the army, after completing the period of their enlistment, are given a certificate of discharge. The employee who perhaps has devoted years of his life to a particular trade, when relinquishing employment, is without evidence to present in another locality or to another employer unless he has some certificate showing the term and character of his previous employment.

It has been said that if a service letter speaks the truth, employers will be subject to libel and damage suits, but this assumes that justice cannot be secured in the courts, a presumption in which we cannot indulge and one which is an unwarranted reflection upon our judicial system.

This legislation, we think, is a warranted and lawful exercise of the police power of the state. The police power of the state was not surrendered with the adoption of the Federal Constitution nor taken from the states by the ratification of the Fourteenth Amendment. This power, though not precisely defined, includes the right to legislate on any matters pertaining to the health, safety and welfare of the public.

It is argued that the law in question involves a private and not a public matter in that only the individual employee and the individual employer are concerned. This is pure assumption and fails to recognize conditions as they exist. The welfare of society very largely depends upon the condition of employees and the relationship of labor and capital, and any lack of morale of employees is quickly reflected in the industrial world. The welfare of employees affects the welfare of entire communities and of the whole public. Failure of employees to work on account of strikes and other causes, may paralize the commerce of the entire country. Legislation has been enacted to shorten the hours of labor and to provide time for recreation and to require the protection of the health and safety of employees. Such legislation, while affecting one particular class, indirectly affects the welfare of the entire public. Employees of railway companies are engafed in handling the commodities of the whole country, and any legislation which
164 has to do with their protection, their comfort and their welfare, is legislation which may be said to be enacted under the broad powers giving the right to legislate in the interests of public welfare, and such legislation may therefore be said to be legislation within the police power of the state.

The Service Letter Law is in line with the spirit of a progressive age. It aims to protect the wage earner in his right to work and labor for himself and for those who are dependent upon him. It aims to protect him from a condition that might pauperize him and his family and indirectly reflect itself in the conditions of society. Cheek v. Prudential Insurance Co., of Am., — Mo. —; 192 S. W. 387. In this case, p. 392, the Supreme Court of Mo., in construing a statute similar to the statute of Oklahoma, said:

"The statute in question is a wise excercise of the public power of the state; it affects a class composed of many thousands of people as to whom, if not protected from the evil mentioned, great hardships, injustice and oppression could be *be* perpetrated upon them. The same principle of police regulation lies at the base of this class of contracts that underlies the regulation of almost every other species of contracts negotiated in this state, the validity of which is no longer challenged."

We think that the legislation attacked does not deny to the defendant due process of law, that it does not constitute an illegal infringement upon the right to contract, and that it is within the police power of the state.

It is argued that this legislation is a denial and abridgment of the right of free speech. Labatt, Master and Servant, Vol. 8, Sec. 2867, suggests:

"The theory that a constitutional provision which merely purports to secure freedom of speech, includes by implication a guarantee of the 'liberty of silence' seems to involve some very questionable logic."

With this statement we fully agree.

The right of free speech is not an absolute one; neither is the right to remain silent. One does not hace the absolute right to speak that which may injure the public or an individual, or to remain silent when silence would work a similar result. In Schenck v. United States, U. S. Adv. Ops. 1918-19, p. 290, 291, it is said:

165 "The most stringent protection of free speech, would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 439, 553 L. ed. 797, 805, 34 L. R. A. (n. s.) 874, 3 Sup. Ct. Rep. 492. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Numerous instances may be cited wherein persons — not privileged to remain silent without suffering the penalty therefor. Refusal of a witness to testify may constitute contempt of court, 13 C. J. p. 25, Sec. 36, and cases cited including Ex-parte Gudenoge, 2 Okla., Cr. 110, 100 Pac., 39; and the same may be indictable, 29 Cyc. 333. Failure of one accused of crime to speak may be relevant as tending to show guilt, 21 Cyc., 421; and an unanswered relevant statement, taken in connection with a failure to reply, may be admissible evidence tending to show a concession of the truth of the facts stated. 16 Cyc. 956. Silence may work an estoppel, 16 Cyc. 681, 759. Failure to disaffirm a contract made by an infant, after reaching his majority, constitutes ratification of same. 22 Cyc. 607. In contracts, acceptance of an offer may be inferred from silence, 9 Cyc. 258; and failure to repudiate acts of agents may bind the principal, 31 Cyc. 1275. Corporations doing business within the state are required by law to file reports showing lists of officers, directors, stockholders, etc. Transportation and transmission companies doing business in this state are required, when directed to do so by the Corporation Commission, to make special reports and statements under oath concerning their business. Other similar and federal

laws requiring the giving of information which more seriously affects the corporation than would the giving of service letters to employees, might be cited; and the validity of these laws has been upheld by the courts. A. T. & S. F. Ry. Co., vs. State No. 8162, Okla. Report IX 366, not officially reported; I. C. C. Goodrich Transit Co., 224 U. S. 194. 56 L. Ed. 729, 132 Sup. Ct. 436.

166 We are unable to agree with the Supreme Court of Georgia in the case of Wallace v. Ga. C. & N. Ry. Co., 94 Ga. 731, 22 S. E. 579; the Supreme Court of Kansas in the case of A. T. & S. F. Ry. Co. v. Brown, 80 Kas. 312, 102 Pac. 459. 23 L. R. A. N. S. 247; 133 Am. St. Rep. 213; 18 Ann. Cas. 346, and the Supreme Court of Texas, in the case of St. L. S. W. Ry. Co., vs. Griffin — Texas —, 171 S. W. 703, 705.

The right of free speech guaranteed by the Constitution of the United States and the Constitutions of the various states does not include the absolute right to remain silent, under all conditions and when doing so may injure the rights of others in public. A corporation exists and does business within the state under and by virtue of the laws of the state. It is subject to such reasonable restrictions as the state may see fit to impose, and these restrictions may include the requirements to give information necessary to the public welfare. We hold that the giving of a service letter to employees discharged or leaving the service is the giving of information which concerns and affects the public welfare and is a reasonable requirement which may be imposed by statute, as was done by the legislature of Oklahoma.

We have not, heretofore, been called upon to construe the service letter law, but in two instances we expressed our belief in its constitutionality. C. R. I. & P. Ry. Co., v. Hall. — Okla. — 169 Pac. 851, 853; St. L. & S. F. Ry. Co., et al. v. Fitzmartin, 39 Okla. 654, 666, 136 Pac. 654. We believe that the better reasoning favors the sustaining of this and similar legislation. We agree with the Supreme Court of Mo., in the case of Cheek v. Prudential Ins. Co. supra, and we feel that the conclusion we have reached is in line with the decisions recognizing the necessity for the protection of laborers. Holden v. Hardy, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; C. B. & Q. R. Co. v. McGuire, 219 U. S. 549, 566, L. ed. 328, 338, 31 Sup. Ct. Rep. 259. Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 34 Sup. Ct. Rep. 761; 51 L. R. A. (N. S.) 1097.

167 The defendant's 3rd Specification of Error is:

"The Court erred in admitting incompetent, irrelevant and immaterial testimony over the objections and exceptions of the defendant, and in excluding competent, relevant and material testimony over the objections and exceptions of the defendant although properly offered."

and his 4th Specification of Error is:

"The court erred in instructing the jury upon the question of damages and was guilty of an abuse of discretion in overruling de-

fendant's motion for new trial and sustaining the judgment for th amount of the verdict in favor of the plaintiff and against th defendant."

We will consider the 3rd and 4th Specifications of Error togeth and in doing so, desire first, to look to the issues joined in the plead ings and to the theory upon which the case was tried in the cou below and as to the character and nature of the testimony offere by the plaintiff and defendant upon the trial of the cause, and as t the instructions given to the jury by the court and those that wer refused.

The plaintiff alleged in his petition by proper averments, the fac of his employment by the railroad company and the duration o the period that he served the company in the capacity of switchman the fact of his injury while in such employment and the circum stances surrounding it as well as to the nature of his injury, th settlement had with the company and that he was compensated fo the same by the company and that when he had sufficiently re covered from the effects of the injury, that he reported to the com pany for duty, as well as the fact of his dismissal from the servic of the company, that he was refused re-employment, and that such re-employment was denied him, and that he asked for and obtained the service letter complained of, then charged the untruthfulnes of the service letter, and that by reason of such untruthfulness of i he was black-listed, and had never since been able to secure employ ment from any other railroad company in the capacity for which his experience had fitted him, and on account of same would b forever precluded from obtaining employment for which he wa fitted with any railroad company, and that, at that time h
168 had a life expectancy of slightly in excess of 20 years; all o which were, at least in some degree, supported by the testi mony by the plaintiff, which if believed by the jury would entitl him to a verdict at the hands of the jury.

The testimony offered by the defendant upon the trial only con tradicted the testimony of the defendant in part. The testimony of the defendant did not contradict the testimony of the plaintif as to the fact of the employment of the plaintiff by the defendant the fact of the duration and character of his services nor the fac of the injury of the defendant or the circumstances surrounding such injury, nor that the railroad company compensated the plain tiff for such injuries, and the issuance of and delivery to the defend ant the service letter and that the statement contained in the servic letter as to why the defendant was dismissed from the service of th railroad company was untrue, and further, that the testimony of fered by the defendant as to the grounds upon which the dismiss of the plaintiff from the service of the railroad company and it refusal to again employ him in the capacity shown, all tende strongly in a negative way to establish the untruthfulness of th statement contained in the service letter as to why the plaintiff wa dismissed from the service of the company, in that such testimony

tended strongly to show that such dismissal from the service of the company and its refusal to again employ him were on account of his age and other physical conditions that rendered him inefficient, and that this was by competent testimony, and in viewing the entire record, we are not prepared to say that the trial court did not err in receiving or rejecting testimony upon the trial of the case, yet, such error was not in our opinion sufficiently grievous as to authorize a reversal of the case upon that ground.

We will next notice the Specifications of Error as to the instructions of the court upon the question of damages; The Court's instructions were as follows:

3. "You are instructed, gentlemen of the jury, that even though you should find from the evidence that the service letter does not state the true cause for the discharge of the plaintiff from
169 the service of the Chicago, Rock Island & Pacific railway company, nevertheless your verdict shall be for the defendant, unless you further find that the plaintiff has suffered damage by reason of his failure to obtain employment as a switchman on account of the statements in the service letter."

4. "You are instructed that before you can award any damages to the plaintiff if any, the proof must show by a preponderance of the evidence, (1), that the contents of the said service letter *was* false, (2), that he was, at the time he alleges he sustained the said damage, a man of *ro*dinary physic*i*al ability, able to perform the work of an average man in the line in which he was making application, and (3), that he was prevented from obtaining said employment for which he at that time, was making application, by reason of the statements contained in the alleged false service letter, which has been set out and introduced in evidence before you, and if you find and believe *foom* the evidence that the contents *if* the said service letter were true or that he was *nat* a man of ordinary physic*i*al ability, able to perform the work of an ordinary individual in the line of employment in which he was making application for work or that he was not prevented from obtaining from the parties to whom said application was made by reason of the statements contained in the said service letter herein, set out, you are instructed that the plaintiff has failed to prove his cause of action, as alleged and your verdict should be for the defendant."

5. "You are instructed that *the* if the plaintiff was issued a service letter as alleged in the petition and that said letter contained a statement relative to the reason for the plaintiff's dismissal, and said statement was untrue, and that because of the issuance of said letter containing said untrue statement, said plaintiff has been denied employment by other railroad companies, then your verdict should be for the plaintiff in such sum as you find from the evidence he has been damaged as the direct and proximate result thereof."

Paragraphs 3 and 4 of the Court's Instructions were the defendant's requested instructions 5 and 7 and certainly the defendant is

not in position to complain of the actions of the trial court in giving the same, and while we think they perhaps stated the law correctly yet we think they were less favorable to the plaintiff than they were to the defendant. Further, that instruction 5 was called for upon the sole issue of fact made by the pleadings and the evidence of both the plaintiff and defendant and is a correct statement of the law upon such issue made; That there was competent evidence tending to support the verdict of the jury and that there was no prejudicial error against the defendant committed by the court in admitting and rejecting testimony, and in giving and rejecting instructions to the jury and that the defendant was not deprived of any constitutional or statutory right, and tha court has repeatedly held that
170 under such circumstances the verdict and judgment in the trial court will not be disturbed on appeal.

Talla vs. Anderson, 156 Pac. 670; Bartlesville Zinc Co. v. James, 166 Pac. 1154; Oklahoma City Land & Dev. Co. v. Adams Engineering Co., 155 Pac. 496; Parker v. Hamilton, 134 Pac. 65; Cox v. Kirkwood, 158 Pac. 930.

The judgment is affirmed.

171 And thereafter, to-wit: on the 1st day of July, 1919, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, June Term, 1919, July 1st, 1919, Fifth Judicial Day.

9118.

J. M. DICKINSON et al., Plaintiffs in Error,

vs.

D. J. PERRY, Defendant in Error.

And now on this day it is ordered by the court that the mandate of this court in the above cause be stayed for 30 days.

172 In the Supreme Court of the State of Oklahoma.

I, Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 171 pages, numbered from 1 to 171 inclusive, is a true and complete transcript of the record and all proceedings in said Supreme Court in the case of The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error, vs. Daniel J. Perry, Defendant in Error, number 9118, as the same remains upon the files and records of said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the

al of said Supreme Court, at the City of Oklahoma City, Oklahoma, is the 16th day of July, A. D. 1919.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By REUEL HASKELL, JR.,
Deputy.

Endorsed on cover: File No. 27,241. Oklahoma Supreme Court. rm No. 157. The Chicago, Rock Island and Pacific Railway mpany, plaintiff in error, vs. Daniel J. Perry. Filed August 6, 19. File No. 27,241.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. [redacted]19

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

DANIEL J. PERRY, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR

No. 337—January 5, 1921.

INDEX.

LIST OF CASES.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. 157.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

DANIEL J. PERRY, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

Daniel J. Perry, defendant in error, hereinafter called plaintiff, brought an action in the District Court of Oklahoma County, State of Oklahoma, March 11, 1916, against Jacob M. Dickinson, as receiver for The Chicago, Rock Island and Pacific Railway Company, for whom The Chicago, Rock Island and Pacific Railway Company was afterwards substituted on appeal, pray-

ing for damages in the sum of $20,000.00 on account of an alleged false service letter given to him August 18, 1915, which he alleges falsely stated the cause of his dismissal from the service of said receiver for the Company. The amended petition, upon which the issues of the trial were joined, was filed May 25, 1916.

AMENDED PETITION.

The opening parts of the amended petition allege the residence of the plaintiff in Pottawatomie County, Oklahoma, and the act of appointment and qualification of J. M. Dickinson, as receiver for the Railway Company, and that he was engaged in the operation of a railroad, performing the duties of a common carrier in the City of Shawnee, Pottawatomie County, Oklahoma, at the time of the alleged issue of the alleged false service letter.

The petition alleges that the plaintiff, on June 30, 1913, while employed as a switchman at Shawnee, Pottawatomie County, Oklahoma, while using a brake on a freight car, was thrown from the car to the ground and injured by reason of a defective condition of the brake, in that the "dog" failed to catch, or engage, the clutch, or notch, in the wheel so as to apply the brake to the car wheels; that while plaintiff's hand was still upon the wheel he took his foot from the "dog," thinking that it had engaged the clutch, and the wheel rapidly turned with him, causing his fall by reason of having his hand upon the brake wheel.

The injuries alleged were to the muscles of the

back, which caused him to be in the hospital of said City of Shawnee for two months and required treatment for another month and his cessation from work for three months longer. Plaintiff went to the Railway Company's surgeon in Chicago upon a certificate of admission from the Company's yardmaster at Shawnee. Plaintiff returned to Shawnee and made a settlement with the Receiver's agents December 17, 1913, and applied for work to the yardmaster of the railroad at Shawnee, exhibiting a certificate of his physical condition, a copy of which was attached to the petition as Exhibit "A", when applying to said yardmaster, who refused him employment on account of incapacity.

On August 18, 1915, the Railway Company's superintendent issued the alleged service letter, a copy of which was attached to the petition as Exhibit "B", which contained, among other things, the statement: "Dismissed on account of responsibility in case of personal injury to himself, June 30, 1913; services otherwise satisfactory"; that thereafter plaintiff sought employment from the agents of the railroad company, who refused to employ him, and later sought employment from the International & Great Northern Railway Company and the Texas & Pacific Railway Company, both at Fort Worth, Texas, and was refused employment, said service letter having been exhibited when making application for the same.

That he had been in the railroad business 25 years; was 51 years of age and in good health and receiving $105.50 per month when injured; that his expectancy was 20 years; that the issue of the alleged false service letter was the proximate cause of his inability to

obtain employment; that the falsity of said contents was known to the Receiver's agents at the time of the issuance of the service letter; that the contents did not truly state the cause for which he was discharged, by reason of which he prayed damages in the sum of $20,000.00.

Exhibit "A" was a copy of a letter of the local surgeon of the railroad at Chicago, dated December 5, 1913.

Exhibit "B" was a copy of the alleged false service letter issued August 18, 1915.

ANSWER.

The answer of the Receiver consisted of a general denial, and the affirmative plea that the Oklahoma service letter statute, upon which the service letter, a copy of which was made Exhibit "B" to the amended petition, was unconstitutional and void on account of repugnant to the Fourteenth Amendment to the Constitution of the United States, denying due process of law and equal protection of the law, and on account of repugnant to Sec. 7, of Art. 2, of the Constitution of Oklahoma, likewise guaranteeing due process, and repugnant to Sec. 22 of Art. 2, guaranteeing liberty of speech.

The issues were joined on the pleadings, and trial had September 21, 1916, and a verdict returned by a jury in plaintiff's favor for $3,000.00, upon which judgment was entered. A motion for new trial, filed in time

was overruled by the court November 18, 1916, and an appeal perfected to the Supreme Court of the State of Oklahoma, where The Chicago, Rock Island and Pacific Railway Company was substituted for Jacob M. Dickinson, as receiver thereof, as plaintiff in error (87). The cause came on for final decision, and the judgment of the Supreme Court of Oklahoma was rendered May 27, 1919, affirming the action of the trial court and the judgment in favor of the plaintiff and an opinion reported in 75 Okla. 25, 181 Pac. 504. No petition for rehearing was filed, and judgment thereby became final.

QUESTIONS INVOLVED IN THE CONTROVERSY.

The sole question involved in this proceeding to review said judgment is, whether or not the Oklahoma service letter statute, as found in the Oklahoma Session Laws of 1907-8, page 516, Art. 3, Chap. 53, and in the Revised Laws of Oklahoma, Annotated, 1910, Sec. 3767, is unconstitutional, in that it denies due process of law and the equal protection of the law as guaranteed to this plaintiff in error by the Fourteenth Amendment to the Constitution of the United States.

The assignments of error specifically set up this contention (6-7) and will be considered under the following specifications of error and sub-heads:

SPECIFICATIONS OF ERROR.

The Oklahoma service letter statute (Sess. Laws of Okla. 1907-8, page 516, Art. 3, Chap. 53;

Rev. Laws of Okla., Ann., 1910, Sec. 3767) is unconstitutional, in that it denies due process of law and the equal protection of the law as guaranteed to this plaintiff in error by the Fourteenth Amendment to the Constitution of the United States.

(A) The Oklahoma service letter statute is not an exercise of the police power of Oklahoma.

(B) If said service letter statute is held by the court to be an exercise of the police power of the State of Oklahoma, it is an unconstitutional and void statute because it provides for an arbitrary and unreasonable classification, including this plaintiff in error in said class.

(C) The Oklahoma service letter statute is not an exercise of the police power, but is a general statute regulating the relation of master and servant, and is one in which the public health, safety, morals and welfare is not directly involved.

ARGUMENT.

The Oklahoma Service Letter Statute (Session Laws, Oklahoma, 1907-1908, p. 516, Art. 3, Chap. 53, Oklahoma Revised Laws, Annotated, 1910, Sec. 3769), is unconstitutional in that it denies due process of law and equal protection of the law as guaranteed to this plaintiff in error by the Fourteenth Amendment to the Constitution of the United States.

(A) *The Oklahoma Service Letter Statute is not an exercise of the police power of the State of Oklahoma.*

(a) *The nature and scope of police power.*

Much has been written upon the nature and scope of the police power reserved to the states in our dual form of Government. It has never been expressly defined and this court has consistently taken the position that outside of the general limitations of the power its particular applications will be left for determination upon the facts of the individual case before the court. The general limitations and scope of the doctrine will be found stated in the following cases.

In the opinion written for the court in the Slaughter-House Cases, (1873), 16 Wall (83 U. S.) 36, 21 L. Ed. 395, Mr. Justice Miller discusses the power in the following language:

> p. 404. "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the

comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property.

'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restrains and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.' *Thorpe* v. *Rut. & B. R. R. Co.*, 27 Vt., 149."

In *Lawton* v. *Steele*, (1893), 152 U. S. 132, 38 L. Ed. 385, Mr. Justice Brown, writing the opinion of the court, discusses the extent and limits of the power as follows:

p. 388. "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passersby; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in

burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier* v. *Connolly*, 113 U. S. 27 (28: 923); *Kidd* v. *Pearson*, 128 U. S. 1 (32: 346). To justify the (137) state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In *Noble State Bank* v. *Haskell*, (1911), 219 U. S. 104, Mr. Justice Holmes makes the following brief reference to the police power:

p. 111. "It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518

> It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In the brief opinion written by Mr. Justice Holmes for the court, in answer to an application for leave to file a petition for rehearing, 219 U. S. 575, the following quotation interprets the above excerpt from the first opinion:

> p. 580. "The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past not to give a new or wider scope to the power."

In the case of *Chicago, B. & Q. R. R. Co.* v. *McGuire*, (1911), 219 U. S. 549, 55 L. Ed. 328, Mr. Justice Hughes, in writing the opinion for the court, discusses the police power as follows:

> p. 569. "The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for

the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

The general limitations of the police power, we believe, are sufficiently stated in the foregoing quotations, which are quoted here for convenience.

(*b*) *Statutes of Georgia, Kansas, Texas and Massachusetts similar to the Oklahoma Service Letter Statute, have been held by the highest courts of these states not to be an exercise of the police power of those States.*

The legislature of Georgia passed an act October 21, 1891, entitled "An Act to require certain corporations to give to their discharged employes or agents the causes of their removal or discharge, when discharged or removed," which act was involved in the case of *Wallace* v. *Georgia, C. & N. Ry. Co.*, 94 Ga. 732, 22 S. E. 579. The plaintiff was chief car inspector for the Railroad and upon his discharge made a written request for a specific statement, in writing, of the reasons for his discharge. After waiting twenty days and failing to receive the requested written statement, the suit followed. The case contains no written opinion and is reported only with the per curiam statement as follows:

"Per curiam. Judgment affirmed."

The headnote of the case indicates the holding of the court as based upon the constitutional provision found in Sec. 6 of the Declaration of Rights, in Article 1 of the Georgia Constitution, guaranteeing freedom of speech, and the fact that the public, as such, is without interest, which can be protected or promoted by the

requirement of the statute making it the duty of incorporated railroad, express and telegraph companies to give their discharged employees letters stating the causes of their discharge. The headnote of the opinion is as follows:

> p. 579. 1. The public, whether as many or one, whether as a multitude or a sovereignty, has no interest to be protected or promoted by a correspondence between discharged agents or employes and their late employes, designed, not for public, but for private, information as to the reasons for discharges, and as to the import and authorship of of all complaints or communications which produced or suggested them. A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph, companies to engage in correspondence of this sort with their discharged agents and employes, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void, and of no effect. Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law.
>
> 2. It follows from the foregoing that the act of October 21, 1891, entitled "An act to require

certain corporations to give to their discharged employes or agents the causes of their removal or discharge, when discharged or removed," is unconstitutional, and that an action founded thereon for the recovery of $5,000 as penalty or arbitrary damages fixed by the statute for noncompliance with its mandate cannot be supported."

The legislature of Kansas passed a statute involving the alleged practice of black-listing, which is found in Dassler's 1901 Statutes of Kansas, page 505, chap. 31, art. 12, secs. 2421 to 2425, Sec. 2422 of which is as follows:

> "That any employer of labor in this state shall, upon the request of a discharged employee, furnish in writing the true cause or reason for such discharge."

In *Atchison, T. & S. F. Ry. Co.* v. *Brown,* (1909), 80 Kan. 312, 23 L. R. A. (NS) 247, 133 Am. St. Rep. 213, 18 Ann. Cas. 346, 102 Pac. 459, in the opinion by Mr. Justice Smith, this act is held not to be an exercise of the police power of the state in the passage:

> p. 460. "The remarks of the late Mr. Justice Greene in holding the provisions of chapter 120, Laws 1897, unconstitutional are equally applicable to the provisions of the law in question. An excerpt from the opinion in *Brick Co.* v. *Perry,* 69 Kan. 297, 76 Pac. 848, reads: 'Before approaching a discussion of the question, let us exclude any notion that the action in question is a police regulation. It will be observed that it does not affect the public welfare, health, safety, or morals of the community, or prevent the commission of any offense or other manifest evil. Where the object of the act cannot be traced to the accomplishment of some one of these purposes, it is not a police

regulation. Besides, the Legislature has no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the Constitution under the guise of a police regulation. It must also be remembered that the right which the plaintiff claimed was violated did not originate in contract, but was purely statutory. Therefore the determination of the question whether he has any remedy depends entirely upon the validity of this statute.' When the relation of employer and employe has ceased by discharge or by quitting the employment, if the employe has been efficient and trustworthy, the employer may be under a moral obligation to benefit the employe by giving him a statement to that effect. On the other hand, if the employe has been inefficient or untrustworthy it may be the employer's moral duty to furnish a prospective employer, upon request, or perhaps without request, a statement of these facts; but the former employer is under no legal obligation so to do either to his ex-employe or to the prospective employer. The public has no interest in the matter, and in neither case can such a duty be imposed as a police regulation, and the attempt by statute to impose the furnishing of such a statement is an interference with personal liberty."

This case was cited in the case of *Coppage* v. *Kansas*, (1914), 236 U. S. 1, at page 24, in an opinion by Mr. Justice Pitney of this court.

The legislature of Texas passed a statute with reference to black-listing, published in the General Laws of Texas, 1909, page 160, (being the Session Laws of the 31st Legislature), chap. 89, sec. 3, of which is as follows:

"Where any corporation, or receiver of the same, doing business in this State, or any agent

or employee of such corporation or receiver, shall have discharged an employee, and such employee demands a statement in writing of the cause of his discharge, and such corporation, receiver, agent or employee thereof fails to furnish a true statement of the same to such discharged employee within ten days after such demand, or where any corporation or receiver of the same, or any officer or agent of such corporation or receiver, shall fail, within ten days after written demand for the same, to furnish to any employee voluntarily leaving the service of such corporation or receiver, a statement in writing that such employee did leave such service voluntarily, or where any corporation or receiver of the same doing business within this State, shall fail to show in any statement under the provision of this Act the number of years and months during which such employee was in the service of the said corporation or receiver in each and every separate capacity or position in which he was employed, and whether his services were satisfactory in each such capacity or not, or where any such corporation or receiver shall fail within ten days after written demand for the same, to furnish to any such employee a true copy of the statement originally given to such employee for his use in case he shall have lost or is otherwise deprived of the use of the said original statement."

This statute was considered by the courts of Texas in the following cases:

St. Louis Southwestern Ry Co. v. *Hixon,* (1911), 104 Tex. 267, 137 S. W. 343;

St. Louis Southwestern Ry Co. v. *Griffin,* (1913) — Tex. Civ. App. —, 154 S. W. 583, which was referred to by the Supreme Court of Texas in *St. Louis South-*

western Ry. Co. v. *Griffin*, (1914), — Tex. —, 171 S. W 703. Mr. Chief Justice Brown, in delivering the opinion of the court, held the statute in question not to be an exercise of the police power, the decision holding the statute unconstitutional and void for this reason, and for the reason that it was in violation of the guarantees of the Fourteenth Amendment of the Constitution of the United States. It is said:

> p. 706. "Beyond controversy, the act of the Legislature is void, unless it can be sustained as an exercise of the police power. To test the validity of the law as an exercise of that power, we will first ascertain the scope of the power as exercised by state Legislatures. We find no more thorough treatment than is embodied in *Railway Co.* v. *Dallas*, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850."

After a quotation from this opinion, discussing the cases of the United States Supreme Court, Mr. Chief Justice Brown closes the opinion with the following paragraph:

> p. 707. "We have quoted thus freely, because by so doing the question is fully presented by Judge Williams in his usual forcible manner, and by the Supreme Court of the United States. There can be no pretense that the act under examination deals with 'the real needs of the people in their health, safety, comfort, or convenience.'
>
> To add cases as authority would be useless, for this is a fundamental principle of free government and gains no force by the repetition of it by different courts. The subject of legislation in this statute and its various provisions, as stated above, are purely personal as between the employe and the corporation, and do not directly affect the pub-

lic, in health, safety, comfort, convenience, or otherwise.

The act is in violation of the Constitution of this state and of the United States, and is void."

This opinion was cited with approval in the case of *Underwood* v. *Texas & P. Ry. Co.*, (1915), (Tex. Civ. App.), 178 S. W. 38, 43 on this proposition.

The Senate of Massachusetts, under a provision of the Constitution, had under consideration a proposed statute (Senate Document 537), which, under a resolution passed April 23, 1915, they submitted to the Supreme Judicial Court of Massachusetts for their opinion, as indicated in the following portion of the resolution:

"Ordered that the opinion of the Justices of the Supreme Judicial Court, be required by the Senate upon the following important questions of law:

First: Is it within the constitutional power of the General Court to enact legislation limiting the right of railroad corporations to discharge their employes for cause by annexing conditions thereto of the nature above set forth?

Second: Is it within the constitutional power of the General Court to enact legislation of the nature above set forth relative to the employes of railroad corporations giving them as a class privileges not enjoyed by the rest of the community?

Third: Are the provisions of Senate Bill No. 537 constitutional?"

The opinion of the Supreme Court is found in In Re Opinion of The Justices, (1915) — Mass. —, 108 N.

E. 807. They hold that the proposed bill has no reference to the safety of the traveling public and dealt only with the relation of master and servant. The following portion of the opinion is pertinent to the question now under discussion:

> p. 808. "Absolute equality before the law and the equal protection of the laws are principles established by the Constitutions of the United States and of this commonwealth. Opinion of the Justices, 211 Mass. 618, 98 N. E. 337. While reasonable classifications may be made by the Legislature in the interests of the public health, public safety and public morals, yet there must be some rational relation between the object to be attained and the classification, in order that it may not violate the constitutional guaranty that all persons, including corporations, shall be equal in the protection afforded by the laws. Many such classifications have been upheld as not contrary to this principle. See, for example, *Louisville & Nashville Railroad* v. *Melton*, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84; *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224, 34 Sup. Ct. 856, 58 L. Ed. 1288. But the proposed bill has no reference to the safety of the traveling public. It applies only to one kind of common carrier and not to others. It imposes a burden upon railroads from which all other common carriers and employers of labor are free. It singles out employes of railroads and confers upon them immunities and advantages enjoyed by no others who work for individuals and corporations, in a particular which has no relation to the kind of employment engaged in by them. In both respects it tends to destroy equality. It creates of railroad employes a specially privileged class, and subjects railroads, as to a matter having no special relation to their

business as distinguished from other kinds of business, to obstacles and burdens from which other employers are free. There is strong ground for the conclusion that the selection of railroads as the sole object of severely criminal legislation as to a matter of having no particular relation to the management of railroads would be arbitrary and hence unwarrantable under the Constitution. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 560, 22 Sup. Ct. 431, 46 L. Ed. 679; *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; Opinion of the Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344. We are of opinion that the second question must be answered in the negative.

It is not necessary to consider whether the proposed bill offends against other provisions of the Constitution. For the reasons already stated, the third question must be answered, No."

We believe these quotations will make clear that the biased courts of the states of Georgia, Kansas, Texas and Massachusetts have considered similar statutes which are, in our judgment, broader in their scope than the Oklahoma Service Letter Statute, not to have been an exercise of the police power of the state. We have quoted from their opinions and urge their reasoning in consideration of the contention herein made for the consideration of this court.

(c) *Decisions on the Oklahoma Service Letter Statute.*

Previous to the opinion of the Oklahoma Supreme Court in this case now under review, the statute had been attacked in the following cases, which had been appealed to the Supreme Court of Oklahoma. Its con-

situtionality had not been passed upon in the cases for the reasons stated.

In *State* v. *Brown,* (1911), 5 Okla. Criminal 579, 114 Pac. 340, the appeal was taken in a prosecution of Brown for wilfully failing to correctly set forth the true cause of a discharged employee. The trial court sustained a demurrer to the information. The appeal was dismissed because a notice of such appeal had not been given as required by the Oklahoma Statutes.

In *St. Louis, S. F. R. Co. et al.* v. *Fitzmartin,* (1913), 39 Okla. 569, 136 Pac. 764, the judgment of the trial court was reversed, but the court found it unnecessary in the consideration of that case to determine any of the questions with reference to the contention that the statute was violative of due process or equal protection, under the Fourteenth Amendment to the Constitution of the United States, or that it impaired the obligations of contract or liberty of speech.

In *Chicago, R. I. & P. Ry. Co.* v. *Hall,* (1916), 60 Okla. 220, 159 Pac. 851, the court refused to pass upon the constitutionality of the statutes, reversing the case upon other grounds stating in the opinion, however, that "the argument against the constitutionality of the act" did not appeal to them.

We call the court's attention to the case of *Coppage* v. *Kansas,* (1915), 236 U. S. 1, and the case of *Truax et al.* v. *Raich,* (1915), 239 U. S. 33, which we believe support the position indicated in the cases quoted from above. We shall take up a discussion at greater length in the latter part of this brief these cases and we

mention them here only to suggest to the court the contention which shall be later made.

We seriously insist that a careful consideration of the language of the Oklahoma Service Letter Statute will show it not to be an exercise of the police power of the State of Oklahoma, as indicated in the opinions which have been quoted from at length in this portion of the argument. We believe it to be a statute regulating the relations of master and servant in a manner and in a degree that does not concern the health, safety, morals, general welfare, or "great public needs" of the public. It seems to us not to be concerned with methods which are "sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

B

If said service letter statute is held by the court to be an exercise of the police power of the State of Oklahoma, it is an unconstitutional and void statute, because it provides for an arbitrary and unreasonable classification, including this plaintiff in error in said class.

(a) *The Nature and Scope of the Police Power.*

We have discussed, in another portion of this brief, and quoted from cases which we think sufficient to call to the court's attention the nature and scope of the police power, which we desire to urge for consideration. The cases quoted from are the following:

Slaughter House Cases, (1873), 16 Wall. (83 U. S.) 36, 21 L. Ed. 395.

Lawton v. *Steele,* (1893), 152 U. S. 132, 38 L. Ed. 385.

Noble State Bank v. *Haskell,* (1911), 219 U. S. 104 and 575, 55 L. Ed. 113.

C. B. & Q. Ry. Co. v. *McGuire,* (1911), 219 U. S. 549, 55 L. Ed. 328.

(b) *Proper Exercise of Police Power Question for Courts.*

The police power is one reserved to the States under the provisions of our dual form of government. It is legislative in character, and so far as the question of whether or not such legislation should be enacted, the decision of the legislature is final. The legislation, however, when once enacted, is still open to review by the judiciary, and by the Supreme Court of the United States particularly where it is contended that the act of the state legislature denies due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. While this question is one which has been decided often, and, we believe, is finally settled, we suggest the following cases to the attention of the court as upholding this contention:

Yick Wo v. *Hopkins,* (1885), 118 U. S. 356, 30 L. Ed. 220.

Plessy v. *Ferguson,* (1895), 163 U. S. 527, 41 L. Ed. 256.

Holden v. *Hardy,* (1898), 169 U. S. 368, 42 L. Ed. 780.

In Re Jacobs, (1885), 98 N. Y. 98, 50 Am. Rep. 636.

People v. *Gillson*, (1880), 109 N. Y. 384, 4 Am. St. Rep. 465, 17 N. E. 343.

(c) *Test for Judging Police Power Statutes.*

The Supreme Court of the United States, in a number or cases, has stated the test by which all statutes, as passed by the states in the exercise of their police power, may be judged when attacked on the ground that they have denied to the complaining party the guaranties of due process and equal protection provided by the Fourteenth Amendment to the Constitution of the United States. The rules are succinctly stated in the opinion of Mr. Justice Van Devanter in *Lindsley* v. *Natural Carbonic Gas Co.*, (1911), 220 U. S. 61, 55 L. Ed. 369, in the following language:

> Page 78. "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classifica-

tion in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

(*d*) *Examples of Arbitrary Classification.*

Among the many cases which have been before the Supreme Court of the United States on the question of unreasonable classification, we have selected a few which we desire to call to the court's attention as illustrative of the application of these tests. Some state cases have been added in this portion of the argument also for their persuasive effect, or because of their particular appropriateness by reason of the peculiar condition of the cases.

Among the early decisions of the United States Supreme Court the basis of the classification that is reasonable and proper, as well as the characteristics of an arbitrary and unreasonable classification, is stated in the opinion of Mr. Justice Brewer in *Gulf, C. & S. F. R. Co.* v. *Ellis* (1897), 165 U. S. 150, 41 L. Ed. 666. In that case it is said:

> Page 667. "The single question in this case is the constitutionality of the act allowing attorney fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases."
>
> * * * * * *

Page 668. "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."

* * * * * *

"A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

"But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (Citing cases), yet it is equally true that such classification cannot be made arbitrarily.

* * * * * *

"'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. * * *'"

In the case of *Cotting* v. *Kansas City Stock Yards Co. and State of Kansas* (*Cotting* v. *Goddard*) (1901), 183 U. S. 79, 46 L. Ed. 92, Mr. Justice Brewer, again

speaking for the court, discussed the extent and application of the police power, from which we quote the following excerpt:

> Page 110. "If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principle of the decision of the supreme court of Kansas in *State* v. *Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the 14th Amendment."

In *A. T. & S. F. Ry. Co.* v. *Vosburg* (1915), 238 U. S. 56, the court, in an opinion by Mr. Justice Pitney, held as arbitrary and unreasonable the reciprocal demurrage statute of Kansas then under consideration. It was there said:

> Page 60. "The precise question now presented is: What is there in the object of the legislation

under consideration that furnishes a ground of distinction between railway company and shipper upon which it is reasonable to say that the latter should be allowed to recover attorney fees when it successfully sues the former, and not *vice versa*? The statute recognizes that the duty of the company to promptly furnish cars, and the duty of the shipper to promptly use them, are reciprocal, and for a breach of either duty the delinquent is penalized in favor of the other party in precisely the same amount—five dollars per day per car. The shipper may also recover his actual damages, if any. The company recovers actual damages, in addition to the penalty, only under special circumstances. No complaint is now made that this is a denial of equal protection, and we lay no stress upon it. But the statute clearly recognizes that either party may be obliged to sue the other in order to recover the penalty, or damages, or both. No reason is suggested, and none occurs to us, why the railroad company, when plaintiff in such an action, will not require the services of an attorney as well as the shipper when he is plaintiff. There is nothing in the nature of the cause of action that renders the burden of preparation more onerous, as a rule, to the shipper when he is plaintiff than to the company when it is plaintiff. There is nothing discernible, therefore, in the purposes of the legislation—which are: to require the prompt furnishing of cars for use, and the prompt use of cars when furnished, and to redress a disregard of either of these requirements by suit when necessary—to give ground for a distinction granting attorney's fees to the shipper when he sues, and denying attorney's fees to the company when it sues. In short, it is erroneous to test the classification by its supposed relation to the object of securing adequate car service, because it really relates rather to the object of securing adequate

prosecution in court of actions respecting car service.

* * * * * *

"The present case is essentially different, for in the Kansas statute the distinction is not rested upon the fact that the plaintiff, whether shipper or company, has a special burden in the litigation that may reasonably be compensated by allowance of attorney's fees; on the contrary, the Act, while recognizing the existence of such burden, allows compensation for it in favor of one class of litigants, but does not allow like compensation to the other class when subjected to the like burden. This, in our opinion, is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment."

In *McFarland, Supervisor of Public Accounts* v. *American Sugar Refining Co.* (1916), 241 U. S. 79, in an opinion by Mr. Justice Holmes, this court held unconstitutional a statute of the State of Louisiana, undertaking a regulation of the business of refining sugar and to impress it with a public interest "by reason of the nature and by reason of the monopolization thereof." The court said:

Page 86. "We deem it sufficient to refer to those that were mentioned by the District Court; a classification which, if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice,—and a creation of presumptions and special powers against it that can have no foundation except the intent to destroy. As to the classification, if a powerful rival of the plaintiff should do no refining within the state it might systematically pay a less price for sugar in Louisiana than it paid elsewhere with

none of the consequences attached to doing so in the plaintiff's case. So of anyone who purchases but does not refine. So of any concern that does not buy and refine more sugar 'than the aggregate of the sugar produced by it from cane grown and purchased by it' as easily might happen with a combination of planters such as the answer gives us to understand has been attempted heretofore." And again:

> Page 87. "We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."

These cases will serve to illustrate, we believe, sufficiently, the contention which we desire to make on the ground, that if the statute is held to be in an exercise of the police power, the classification is arbitrary and unreasonable, and the decision of the Supreme Court of Oklahoma sustaining the judgment of the trial court should be reversed.

The classification seems to us to be arbitrary, and without any basis of fact, considering the inherent nature of the business of those against whom the inhibition is directed. There is no separate or different working condition required of public service corporations or contractors from that required of other corporations, individuals and partnerships employing labor under similar conditions. Numbers of other businesses, such as mines, the oil industry, iron foundries, cotton mills, powder plants, meat packing plants, mills, automobile factories, are all required to provide the same conditions with reference to physical conditions for the protection of life and limb of the employee as the public utilities

companies and contractors. It seems that the reason for the classification is not inherent in the nature of the business, and that for this reason it does not operate uniformly upon the employers of this class, who are generally included in it when legislation affecting the relations of master and servant, is under consideration.

There is no proof in the record that the alleged black listing evil existed at the time of the enactment of the legislation, or at the time of the trial. There is positive proof, as shown by the testimony of the witness Reddig (49), the witness Wildman (50-51) and the witness Chandler (54), that employees were not required to present a service letter before employment on the Chicago, Rock Island and Pacific Railway Company, St. Louis and San Francisco Railroad Company and St. Louis, Iron Mountain & Southern Railway Company, and that this was the general policy of roads in the southwestern portion of the United States. It seems to us clear that the evil itself, at which the statute was directed, was shown by the record not to have existed.

The statute, therefore, could not have any reasonable relation to the purported condition, and we believe it clear also that it would not be held to be a public service to enact a piece of legislation of this character directed against a portion of the employers of a section when the classification was, as it is in our judgment, arbitrary and unreasonable and without basis of fact. We insist, therefore, that if the court should be of opinion that the statute itself was passed in the exercise of the police power of the state of Oklahoma, under the illustrations set out in this portion of the brief, and

the condition of the record herein, it should be held to be an arbitrary and unreasonable use of said power, and therefore unconstitutional and void.

(C) *The Oklahoma Service Letter Statute is not an exercise of the police power, but is a general statute regulating the relation of master and servant, and is one in which the public health, safety, morals and public welfare is not directly involved.*

We quote the Act here for the convenience of the court, and include the title.

AN ACT

"Relating to the employes of corporations and contractors; and prescribing the duties of the employer at the termination of the services, requiring a letter of discharge, and providing penalties for violation hereof.

Be It Enacted by the People of the State of Oklahoma:

Section 1. That whenever an employe of any public service corporation, or of a contractor, who works for such corporation, doing business in this state, shall be discharged or voluntarily quits the service of such employer it shall be the duty of the superintendent or manager, or contractor, upon request of such employe, to issue to such employe a letter setting forth the nature of the service rendered by such employe to such corporation or contractor and the duration thereof, and truly stating the cause for which such employe was discharged from or quit such service and, if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employe,

when so requested, or shall wilfully or negligently refuse or fail to state the facts correctly, such superintendent, manager or contractor shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the county jail for a period of not less than one month and not exceeding one year. Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employe. No printed blank shall be used, and if such letter be written upon a typewriter, it shall be signed with pen and black ink and immediately beneath such signature shall be affixed the official stamp, or seal, of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters used, upon such piece of paper, except such as are plainly essential, either in the date line, address, the body of the letter or the signature and seal or stamp thereafter, and no such letter shall have any picture, imprint, character design, device, impression or mark, either in the body thereof or upon the face or back thereof and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above prescribed.

Approved April 24th, 1908."

We call the attention of the court to the title which is broader than the language of the Act, Sec. 1. The title is "An Act relating to the employes of corporations and contractors; etc." The first words of the act are: "That whenever any employe of any public service corporation, or of a contractor, who works for such

corporation." There is nothing, therefore, in it which would indicate the fact that it was passed in the exercise of the police power, and a careful reading of the act itself will show that it does not contain the clause sometimes included in exercises of this power, that it is passed for the immediate preservation of the public health, peace and safety of the state. The consideration given to legislation of this character by the state of Georgia, Kansas, Texas and Massachusetts, referred to in the earlier portions of this brief; would indicate that in their opinion this is not legislation passed in the exercise of the police power. As expressly stated in the language of the opinions in some of those cases, it is not legislation in which the public safety, welfare, morals, etc., are directly interested. It can not, we believe, to be said in the language of this court, in the case of *Noble State Bank* v. *Haskell*, "in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

We believe it will be a matter of common knowledge that no such practice as black-listing, if it once existed, has existed for many years. We do not anticipate that it will be seriously urged that the statute in any way relates to "prevailing morality," or that it is "greatly and immediately necessary to the public welfare." We may not have properly interpreted the attitude of this court in other cases before it, which have been only incidentally referred to or not mentioned at all thus far in this brief.

We do believe, however, that this court, in the con-

sideration of *Coppage* v. *Kansas*, (Kan. 1915), 236 U. S. 1, considered a statute dealing with the relation of master and servant, which was not considered to be in exercise of the police power of the state of Kansas. As is well known, the statute made it a misdemeanor for an employer to require an employe to agree not to become a member of any labor organization. That statute was considered by this court in an opinion by Mr. Justice Pitney, and the conclusion reached that it was repugnant to the due process clause of the Fourteenth Amendment. A portion of the opinion is quoted here in support of the suggestion which we have just made dealing with the character of the statute, and the grounds upon which it was held repugnant.

> p. 14. "An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power. To avoid possible misunderstanding, we should here emphasize, what has been said before, that so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case. As has been many times stated, this court deals not with moot cases or abstract questions, but with the concrete case before it. (*California* v. *San Pablo, etc., Railroad*, 149 U. S. 308, 314; *Richardson* v. *McChesney*, 218 U. S. 487, 492; *Missouri, Kan. & Texas Ry.* v. *Cade*, 233 U. S. 642, 648.)

We do not mean to say, therefore, that a state may not properly exert its police power to prevent coercion on the part of employers towards employes, or vice versa. But, in this case, the Kansas court of last resort has held that Coppage, the plaintiff in error, is a criminal punishable with fine or imprisonment under this statute simply and merely because, while acting as the representative of the Railroad Company and dealing with Hedges, an employe at will and a man of full age and understanding, subject to no restraint or disability, Coppage insisted that Hedges should freely choose whether he would leave the employ of the company or would agree to refrain from association with the union while so employed. This construction is, for all purposes of our jurisdiction, conclusive evidence that the state of Kansas intends by this legislation to punish conduct such as that of Coppage, although entirely devoid of any element of coercion, compulsion, duress, or undue influence, just as certainly as it intends to punish coercion and the like. But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362, and cases cited. Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under the title that declares a purpose which would be a proper object for the exercise of that power. 'Its true character cannot be changed by its collocation,' as Mr. Justice

Grier said in the Passenger Cases, 7 How. 283, 458. It is equally clear, we think, that to punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose of repressing coercion, duress, and undue influence. Nor can a state, by designating as 'coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard. We of course do not intend to attribute to the legislature or the courts of Kansas any improper purpose or any want of candor; but only to emphasize the distinction between the form of the statute and its effect as applied to the present case.

Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the Act to the public health, safety, morals or general welfare? None is suggested, and we are unable to conceive of any. The Act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of di

rect concern to the general welfare. If they were, a different question would be presented."

The court seems, in the following quotation, to have had in mind the probability that this legislation was an exercise of the police power and to have held it not in that class, although it may have been urged that it was within that class. On this question it was said:

p. 18. "We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in *Holden* v. *Hardy*, 169 U. S. 366, 391; *Chicago, B. & Quincy R. R.* v. *McGuire* 219 U. S. 549, 566; *Erie R. R.* v. *Williams*, 233 U. S. 685; and other recent decisions. An evident and controlling distinction is this: that in those cases it has been held permissible for the states to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability or leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his 'financial independence.' In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the

> Fourteenth Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment."

In *Truax et al.* v. *Riach*, (1915), 239 U. S. 33, in an opinion by Mr. Justice Hughes, this court considered a statute of Arizona entitled "An Act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona, and to provide penalties and punishment for the violation thereof." The opinion seems to exclude the act from the domain of the police power, in the following portion:

> p. 41. "It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins, supra; Allgeyer* v. *Louisiana*, 165 U. S. 578, 589. 590; *Coppage* v.

Kansas, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a police were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality."

The question is stated in an earlier part of the opinion, and also seems consistent with the portion just quoted.

> p. 39. "The question then is whether the act assailed is repugnant to the Fourteenth Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the union. (See *Gegiow* v. *Uhl, Commissioner*, decided October 25, 1915, ante, p. 3). Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws."

Some of the state courts have apparently considered legislation of a similar character in line with this contention in our judgment. In the case of *Bedford Quarries Co.* v. *Bough*, (Ind. 1907), 80 N. E. 529, the Supreme Court of Indiana held unconstitutional the Indiana Employers' Liability Act, because it was violative of the Fourteenth Amendment to the Federal Constitution, and imposed on corporate employers burdens not imposed on individuals and partnerships, the language of the Act being "other corporations, etc., except municipal." The court dealt with the Act as an unreasonable classification for legislative purposes, but apparently did not consider that it was an exercise of the police power of the state, dealing with it as a statute regulating the liability of a certain class of employers, and finding the basis of classification arbitrary because not inherent in class.

In *State* v. *Nashville, C. & St. L. Ry. Co.*, (1911), 104 Tenn. 1, 135 S. W. 773, the Supreme Court of Tennessee held as class legislation unwarranted by the character of the corporations included in the class and

statute forbidding a corporation, etc., to discharge any employee for voting or not voting at any election, or for or against any candidate, or trading or not trading with a particular person. The statute was criminal in its nature, and entitled, "An Act to prevent joint-stock companies, associations, and corporations organized or chartered under the laws of this state, from impairing or infringing upon the rights, privileges, and liberties of their servants and employes."

If the contention which we have made in this portion of the brief is well founded, the Oklahoma Service Letter Statute, in our judgment, cannot be upheld. We urge a consideration of the attack most seriously upon the court. It may be thought that the burden imposed is mild or the infringement of this plaintiff in error's rights not serious. Upon that subject we call to the court's attention the following portion of the opinion of this court, written by Mr. Justice Bradley, in *Boyd* v. *United States*, (1885), 116 U. S. 616, 29 L. Ed. 746, where it was said:

> p. 752. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy en

> croachments thereon. Their motto should be *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

It is true, this language was used in a case somewhat different from the one now under consideration. It concerned the seizure and forfeiture of property by the government, of certain cases of plate glass, seized by the collector and forfeited, under an act relating to customs revenue laws. In this case now under consideration, the court is considering an obligation to "truly state the cause of the discharge" of employees. A civil liability, it has been contended, is created by a breach of this statute, and the doors thrown open to litigation ending in damages awarded by juries for the alleged deprivation of the right to obtain employment. The record clearly shows that employment was not sought generally but only of the three railroads mentioned in the summary already made of the amended petition, namely, the C. R. I. & P. Railway Company, the International & Great Northern Ry. Co., and The Texas & Pacific Ry. Co. The question of fact, we recognize, is closed to us by the record in this case. The justice of our contention, however, we submit is not determined by that fact and the alleged error of the trial court and the Supreme Court of Oklahoma in affirming the judgment and basing it upon the Oklahoma Service Letter Statute as a proper exercise of the police power of the state.

We insist that properly this is legislation relating to the general domain of master and servant, and that it is not such acts as concern the public generally, either with reference to its safety, health, morals or public welfare.

CONCLUSION.

We urge upon the court, by way of summary, the facts in detail set forth, to the effect that the Oklahoma Service Letter Statute is similar legislation to that enacted by the states of Georgia, Texas and Kansas and proposed by the state of Massachusetts, and that the highest courts of those states considered it not a proper exercise of the police power of the state.

We further urge upon the court, if it should be considered to be an exercise of the police power of Oklahoma, that it is an act, whose title is broader than the language of the act itself, and that the language of the act itself is directed against the class, which classification has no basis inherent in the class, whose operation is not uniform upon all the members of the class, based upon the necessary members to be included in the proper limits of the class and that, therefore, it is not a statute corrective of an evil, which we have shown by the record did not exist and which the statute, therefore, does not have a reasonable relation to in connection with a permissible public purpose, necessary to justify the attempted exercise of the police power of the state.

We contend that the cases of this court, notably those of *Coppage* v. *Kansas* and *Truax et al.* v. *Raich*, support this contention by a fair construction, and are to the effect that legislation dealing with the right of labor to find employment is not within the police power

of the state and not a subject in which the public safety, health, morals or public welfare is directly concerned.

Respectfully submitted,

C O Blake

R. J. Roberts

Thos. P. Littlepage

Sidney F. Talaferro

Attorneys for Plaintiff in Error.

El Reno, Oklahoma,
January 4, 1921.

In the Supreme Court of the United States

October Term, 1920

The Chicago, Rock Island & Pacific Railway Company,
Plaintiff in Error,

vs.

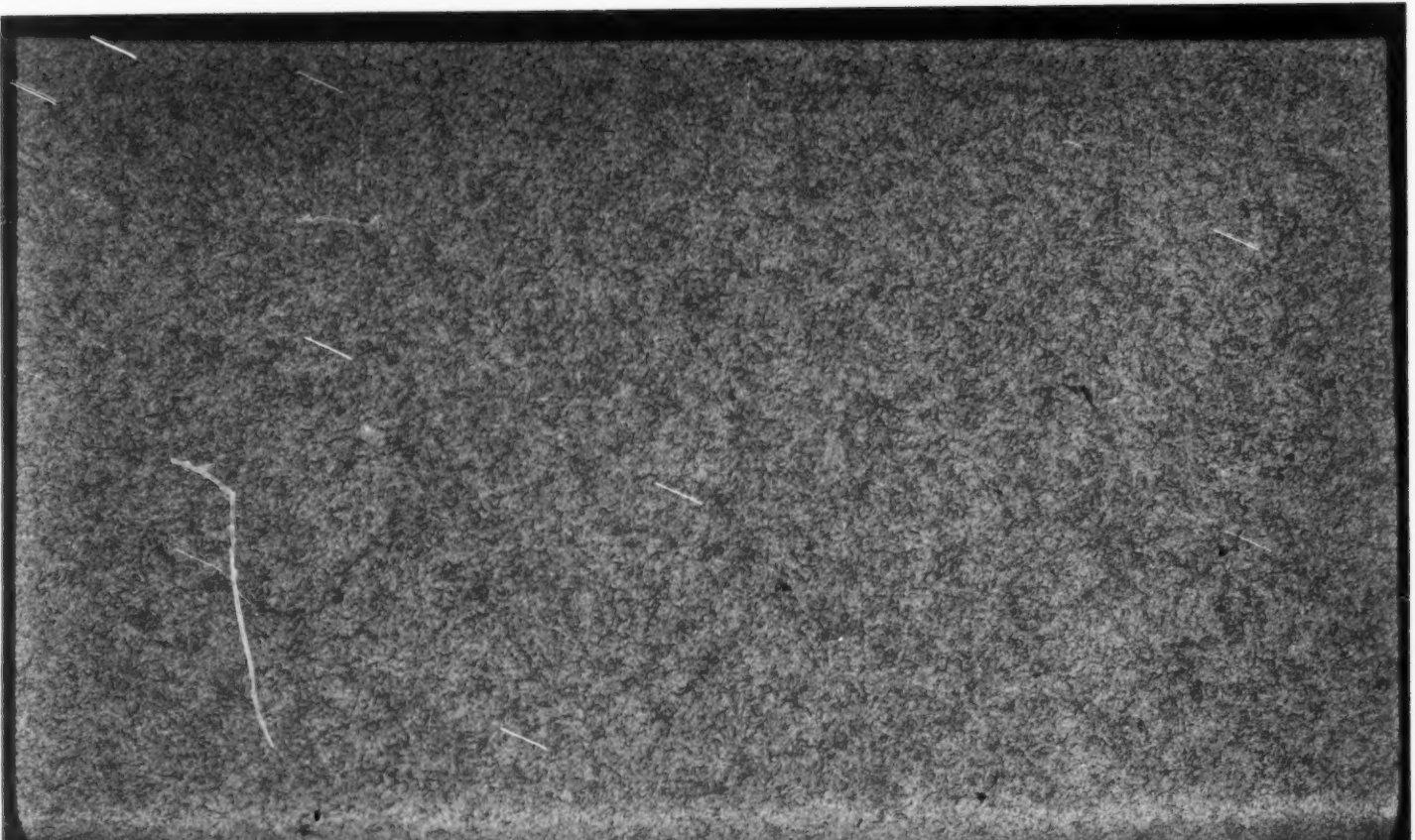
Daniel J. Perry,
Defendant in Error.

No. 19

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Edward S. Vaught,
Jean H. Everest,
Phil. D. Brewer,
Attorneys for Defendant in Error.

Oklahoma Law Brief Company, 120½ West First Street, Oklahoma City



In the Supreme Court of the United States

October Term, 1920

The Chicago, Rock Island & Pacific Railway Company,
Plaintiff in Error,

vs.

Daniel J. Perry,
Defendant in Error.

No. 157

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Comes now the defendant in error, Daniel J. Perry, and most respectfully moves this Honorable Court to dismiss the petition in error filed herein, and to refuse to take jurisdiction of this case, because:

I.

This proceeding in error prosecuted from the decision and judgment of the Supreme Court of

the State of Oklahoma, does not, *necessarily*, present a federal question, because there is not drawn in question the validity of any treaty or statute of or authority exercised under the United States, or the validity of a statute of, or authority exercised under the laws of the State of Oklahoma, upon the ground that same is repugnant to the constitution, treaties or laws of the United States, and this defendant in error believes that this will be manifest upon the face of the record filed herein.

STATEMENT.

The amended petition filed by defendant in error in a District Court of the State of Oklahoma is set out in the printed record beginning with page 15, and, summarized, alleges substantially that defendant in error had been theretofore, for a long time, in the employment of the Railway Company as a switchman, and while engaged in such employment, without fault upon his part, but because of the fault and negligence of the railway company, had been thrown from a box car and seriously injured. That while in the hospital at the railway company's expense and without any claim for damages upon his part, and without any attorney representing him, the railway company offered to pay him, and did pay him, a sum of money in settlement

for his injuries. That later, when able to resume work, he returned to the place of his former emment and reported for duty, delivered to the general yard master a certificate from the company's physician that he was able to resume work, but that he was not re-employed, but was advised that he was out of the service because—ineligible for duty. That thereafter on August 18th, 1915, the railway company, through its superintendent, gave the defendant in error a service letter, as follows:

"Haileyville, Okla., Aug. 18, 1915.

"This is to certify: That, Daniel Jackson Perry has been employed on the Indian Territory Division of the Chicago, Rock Island and Pacific Railway Company as switchman from November 1st, 1904, until July 1st, 1913.

"Dismissed: Account responsibility in case of personal injury to himself June 30th, 1913. Services otherwise satisfactory.

"H. F. Redding,
"Superintendent."

That defendant in error thereafter tried to secure employment from the plaintiff in error railway, but was refused on account of the statements in said service letter; that he sought employment from various railway companies, naming them, both in Oklahoma and Texas, but upon examination of the service letter, although the railway company

applied to for employment was in need of such services as he was competent to render, they uniformly refused to employ him because of the statement in the letter:

"Dismissed account responsibility in case of personal injury to himself June 30th, 1913."

The petition then continues as follows:

"Plaintiff alleges that the issuance of said letter, and the contents of that letter, which said letter did not truly state the facts, or give the true reason for his discharge, constitute the proximate cause of the refusal of all other railroad corporations to employ this plaintiff, and of the damages he sustained by being prevented from obtaining employment; and that the refusal of other railroad corporations to employ this plaintiff is due directly and proximately to the issuance and contents of said service letter.

"Plaintiff further alleges that the said letter, upon its face, charges this plaintiff with being responsible, directly, for the injury which he sustained on June 30th, 1913, and said statement is untrue, and at the time of the issuance of said letter was known to be untrue by defendant; but that, said plaintiff alleges, said railway company admitted its liability for said accident, which resulted in plaintiff's injury, by making a settlement with this plaintiff for said injury, by caring for him in its hospital, both in Shawnee and in Chicago, and rendering professional services free to this plaintiff.

"Plaintiff further alleges that said settlement on the part of the plaintiff, and on the part of the defendant railway company, was made with the

advice and sanction only of the defendant railway company's physicians and attorneys, and this plaintiff, while at the hospital, was not permitted to see any attorney, and when his own attorney called, this plaintiff was not permitted to see him, and that he never did see or consult an attorney in regard to his matters until after this settlement; but plaintiff alleges that by virtue of this settlement the defendant company admitted its own liability, and that, therefore, the statements and things set forth in said service letter were known by defendant to be not true, but that said service letter was issued to plaintiff for the purpose of preventing this plaintiff from securing employment either with the defendant company, or with any other railroad company; and that, by issuing said service letter, the said company has prevented this plaintiff from securing employment with any other railroad company, and that, therefore, this plaintiff has been damaged in the sum of twenty thousand dollars ($20,000.00.)"

To this petition the plaintiff in error railway company answered in the court below by a general denial of all of the allegations of the petition, and

"II.

"This defendant avers that said statute of the State of Oklahoma upon which plaintiff bases his action, and for which plaintiff seeks damages by reason of the breach of the same by this defendant, was at date of its passage and approval and at the date of the issuance of the service letter set out by the plaintiff therein as Exhibit 'B,' was unconstitutional and void, and deprived this defendant of due process of law and the equal protection of the law as guaranteed to him under the 14th amendment of the Constitution of the United States, and

Section 7 of Article 2 of the Constitution of the State of Oklahoma; and for the further reason that said statute violates Section 22 of Article 2 of the Constitution of the State of Oklahoma, in denying to this defendant freedom of speech and the press, including the right to remain silent."

The case was tried before a jury in the District Court of Oklahoma County, Oklahoma, upon the issue raised by the general denial, under instructions of the court upon the theory of the plaintiff that the allegation in the letter—

"Dismissed account responsibility in case of personal injury to himself June 30th, 1913,"

was false and untrue and was derogatory and damaging to defendant in error in that it prevented him from obtaining employment from plaintiff in error railway and all other railways in the only line of work in which he had spent his life and was competent. He alleged and proved special damages and was awarded a judgment for $3000.00 under this theory.

To show that the issue tried to the court was solely that of the question as to whether or not the statements made were false and derogatory and whether or not the defendant in error had suffered damage thereby, we refer to the instructions of the trial court commencing at page 74 printed record, wherein the court, after stating the issues to the

jury, and defining the burden of proof, instructed the jury:

"You are instructed, gentlemen of the jury, that even though you should find from the evidence that the service letter does not state the true cause for the discharge of the plaintiff from the service of the Chicago, Rock Island & Pacific Railway Company, nevertheless your verdict shall be for the defendant, unless you further find that the plaintiff has suffered damage by reason of his failure to obtain employment as a switchman on account of the statements in the service letter.

"You are instructed that before you can award any damages to the plaintiff, if any, the proof must show by a preponderance of the evidence: (1) That the contents of the said service letter was false; (2) that he was, at the time he alleges he sustained the said damages, a man of ordinary physical ability, able to perform the work of an average man in the line in which he was making application; and (3) that he was prevented from obtaining said employment for which he, at that time, was making application, by reason of the statements contained in the alleged false service letter, which has been set out and introduced in evidence before you, and if you find and believe from the evidence that the contents of the said service letter were true or that he was not a man of ordinary physical ability, able to perform the work of an ordinary individual in the line of employment in which he was making application for work or that he was not prevented from obtaining employment from the parties to whom said application was made by reason of the statements contained in the said service letter herein set out, you are instructed that the plaintiff has failed to prove his cause of action, as alleged, and your verdict should be for the defendant.

"You are instructed that if the plaintiff was issued a service letter as alleged in the petition and that said letter contained a statement relative to the reason for plaintiff's dismissal, and said statement was untrue, and that because of the issuance of said letter containing said untrue statement said plaintiff has been denied employment by other railroad companies, then your verdict should be for the plaintiff in such sum as you find from the evidence he has been damaged as the direct and proximate result thereof."

Under the issue so before it and the instructions of the court, the trial jury found a general verdict for the defendant in error in the sum of $3000.00, and this necessarily involved a finding by the jury that the railway company had made false statements in writing against the defendant in error and that he has furnished proof of special damages in the amount of the verdict found.

In the assignment of errors (pages 6 and 7 printed record) plaintiff in error has through the medium of ten separate assignments complained that the Supreme Court of the State of Oklahoma erred in holding that the provisions of Chapter 53, Article 3, of the Session Laws of the State of Oklahoma for the years 1907-08, page 516, are in conflict with and in violation of the provisions of the 14th amendment of the Constitution of the United States, for that the State of Oklahoma by and

through the provisions of said Chapter 53, assumes and seeks:

"(a) To deprive the plaintiff in error of rights, privileges and immunities secured to it.

"(b) To deprive the plaintiff in error of property without due process of law.

"(c) To deprive and to deny to the plaintiff in error, within the jurisdiction of the State of Oklahoma, the equal protection of the law."

And that the Supreme Court erred in refusing to give to the jury the defendant's (railway company's) instruction No. 4, which said instruction in words and figures is as follows:

"No. 4. You are instructed that you will allow the plaintiff no damages by reason of the issuance to him of a false service letter in violation of the statute of Oklahoma requiring said issuance of a service letter, for the reason that the statute of the State of Oklahoma is in violation of the Constitution of the United States and the Fourteenth Amendment thereof, and denies to this defendant due process of law and the equal protection of the law."

The statute of Oklahoma complained of is found in Volume One, Revised Laws of 1910, Section 3769, and is as follows:

"CORPORATION TO GIVE LETTER TO EMPOYEE LEAVING SERVICE. Whenever any employee of any public service corporation, or of a contractor, who works for such corporation, doing business in this State, shall be discharged or

voluntarily quits the service of such employer, it shall be the duty of the superintendent or manager, or contractor, upon request of such employee, to issue to such employee a letter setting forth the nature of the service rendered by such employee to such corporation or contractor and the duration thereof, and truly stating the cause for which such employee was discharged from or quit such service; and, if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employee, when so requested, or shall wilfully or negligently refuse or fail to state the facts correctly, such superintendent, manager or contractor shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the county jail for a period of not less than one month and not exceeding one year; Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employee. No printed blank shall be used, and if such letter be written upon a typewriter, it shall be signed with pen and black ink and immediately beneath such signature shall be affixed the official stamp, or seal, of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters use upon such piece of paper, except such as are plainly essential, either in the date line, address, the body of the letter of the signature and seal or stamp thereafter, and no such letter shall have any picture, imprint, character, design, device, impression or mark, either in the body thereof or upon the face or back

thereof, and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above prescribed."

ARGUMENT AND AUTHORITIES.

We contend, most seriously, that the plaintiff in error Railway Company, *having seen proper of its own volition to give to the defendant in error upon his dismissal from service a clearance or service letter which was false*, that it will not be heard to say that it gave the letter in obedience to an unconstitutional statute and that, therefore, no matter if the letter was false, and the defendant in error plead and was able to prove to the satisfaction of a jury that he had suffered special damages, that relief should be granted through an attack upon the law of the state as being repugnant to the Federal Constitution.

We cannot believe that the 14th amendment to the Federal Constitution, or any other amendment to, or section thereof, was intended to, or in fact, can be used for the protection of one who makes false statements in regard to another which, with

their innuendoes, is damaging and derogatory and causes special damage which is plead and proven.

If this suit had been brought for a failure to give the letter or otherwise obey this statute, then the question of its constitutionality could be urged. Under the facts of this case, we feel like it ought not to be urged by plaintiff in error or considered by the court. The custom and habit of giving service letters, or, as they are sometimes called, clearances, to employees quitting a master's service, is far older than any of the statutes such as the one under consideration, and it ought to be assumed that if the service letter law of Oklahoma is unconstitutional, that the Railway Company had knowledge of that fact and that the service letter in question was not, therefore, given at the behest of the statute thereof, but rather because of the general custom so to do, unless indeed it might have had a more sinister purpose.

It is true that the Supreme Court of Oklahoma in its decision upheld the validity of the statute in question as being a law that the State was competent to pass as a proper exercise of its police power, but it was quite unnecessary for the court to do so, and this was pointed out to the Court, and

we believe that the fact that it did so is no reason why this Honorable Court should be called upon to exercise its jurisdiction simply because the Supreme Court of Oklahoma did an unnecessary thing.

This Court, of course, is entirely familiar with its long line of decisions commencing in 1827 in *Montgomery* v. *Hernandes*, 12 Wheat. 129, that—

> "To give the court jurisdiction it must appear affirmatively, not only that the Federal question was presented for decision, but that its decision was necessary to a determination of the cause, and that it was actually decided."

We also invoke the rule of this Honorable Court that it will refuse jurisdiction unless a real and not fictitious Federal question is involved. *Millinger* v. *Hartupee*, 73 U. S. 258 (1867); *Parker* v. *McLain*, 237 U. S. 469 (1915), and many other cases.

In fact in conclusion we urge that the attitude of the plaintiff in error is fully shown in its Assignment of Error No. 9, Record 7, which complains of the refusal of the trial court to instruct the jury that no recovery of damages could be had

" * * * BY REASON OF THE ISSUANCE TO HIM OF A FALSE SERVICE LETTER IN VIOLATION OF THE STATUTE OF OKLAHOMA," ETC.,

which is but another way of saying, that no matter if we did make false statements about the employee, and at the time knew them to be false, and no matter if these false statements did damage him, and he was able to prove his damage, we cannot be held liable because, on account of the service letter statute being unconstitutional, we were under no legal duty to give a letter, or to speak the truth if we did.

Respectfully submitted,

EDWARD S. VAUGHT,
JEAN H. EVEREST,
PHIL. D. BREWER,

Attorneys for Defendant in Error.

Oklahoma City, Oklahoma.

In the Supreme Court of the United States

No. ~~157~~ 19

THE CHICAGO, ROCK, ISLAND AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

DANIEL J. PERRY, *Defendant in Error.*

BRIEF IN REPLY TO BRIEF AND MOTION TO DISMISS FOR WANT OF JURISDICTION

No. 334—September 15, 1920. Harlow, Okla. City.

SUBJECT INDEX.

I.

II.

LIST OF CASES.

In the Supreme Court of the United States

OCTOBER TERM, 1920

No. 157

THE CHICAGO, ROCK, ISLAND AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

DANIEL J. PERRY, *Defendant in Error.*

BRIEF IN REPLY TO BRIEF AND MOTION TO DISMISS FOR WANT OF JURISDICTION

The single ground stated by counsel for defendant in error upon which their motion is based we re-state for convenience as follows:

Brief P. 1. "This proceeding in error prosecuted from the decision and judgment of the Supreme Court of the State of Oklahoma, does not, *necessarily,* present a federal question, because there is not drawn in question the validity of any treaty or statute or authority

exercised under the United States, or the validity of a statute of, or authority exercised under the laws of the State of Oklahoma, upon the ground that same is repugnant to the constitution, treaties or laws of the United States," etc.

We desire to urge that this contention of counsel for defendant in error is not supported by the record and offer the following argument in support of our position:

I. *This proceeding was based upon the Oklahoma service letter statute, the constitutionality of which being attacked, there was "drawn in question * * * the validity of a statute of, or authority exercised under the laws of the State of Oklahoma."*

The Supreme Court of the United States in the case of *Powell* vs. *Supervisors of Brunswick County* (1893) 150 U. S. 433, 37 L. Ed. 1134, has stated clearly the requisites for presentation of a federal question sufficient to support a writ of error. It is there said:

P. 1136. "As many times reiterated, it is essential to the maintenance of jurisdiction upon the ground of erroneous decision as to the validity of a state statute or a right under the Constitution of the United States, that it should appear from the record that the validity of such statue was drawn in question as repugnant to the Constitution and that the decision sustained its validity, or that the right was specially set up or claimed and denied. If it appear from the record by clear and necessary intendment that the federal question must have been directly involved so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn in question and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered.

A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a federal question by its decision."

(a) PETITION.

The amended petition upon which the case was tried describes in detail the relations of the parties and the circumstances under which defendant in error received an injury, June 30th, 1913, while employed as a switchman. Allegations concerning his subsequent treatment follow and his efforts to get back into the service of the Company after his injury and treatment. It is alleged that a service letter was issued to him in the following portion of the amended petition.

Tr. p. 16. "On August 18th, 1915, the said Railway Company through its Superintendent, H. F. Reddig, at Haileyville, Oklahoma, issued to this plaintiff a Service Letter, a copy of which Service Letter is hereto attached, marked Exhibit B and made a part of this petition; that after the issuance of said Service Letter, which Service Letter stated after reciting the length of time which this Plaintiff had been employed by said Railway Company 'Dismissed account responsibility in case of personal injury to himself June 30th, 1913. Services otherwise satisfactory.'"

It is further alleged in the amended petition as follows:

Tr. p. 17. "* * * because of the issuance of said Service Letter by the said Railway Company this plaintiff cannot procure employment either from the defendant company or from any other railroad company; that by said Service Letter this plaintiff has been blacklisted and that he has been denied employment by other railroad companies because of the wording of said letter."

Again:

Tr. p. 18. "Plaintiff alleges that the issuance of said Letter and the contents of that Letter, which said Letter did not truly state the facts, or give the true reason for his discharge, constitute the proximate cause of the refusal of all other railroad corporations to employ this plaintiff, and of the damages he has sustained by being prevented from obtaining employment and that the refusal of other railroad corporations to employ this plaintiff, and of the damages he has sustained by being prevented from obtaining employment; and that the refusal of other railroad corporations to employ this plaintiff is directly due and proximately to the issuance and contents of said Service Letter.

Plaintiff further alleges that the said Letter upon its face, charges this plaintiff with being responsible, directly, for the injury which he sustained on June 30th, 1913, and said statement is untrue, and at the time of the issuance of said letter was known to be untrue by defendant; but that, said plaintiff alleges, said Railway Company admitted its liability for said accident, which resulted in plaintiff's injury, by making a settlement with this plaintiff for said injury, by caring for him in its hospital, both in Shawnee and in Chicago, and rendering professional services free to this plaintiff.

Plaintiff further alleges that said settlement on the part of the plaintiff, and on the part of the defendant Railway Company, was made with the advice and sanction only of the defendant Railway Company's physicians and attorneys, and this plaintiff, while at the hospital, was not permitted to see any attorney, and when his own attorney called, this plaintiff was not permitted to see him, and that he never did see or consult an attorney in regard to his matters until after this settlement; but plaintiff alleges that by virtue of this settlement the defendant company admitted its own liability, and that therefore the statements and things set forth in said Service Letter were known by defendant to be not true, but that said Service Letter was issued to plaintiff for the purpose of preventing this plaintiff from securing employment either with the

defendant company, or with any other railroad company; and that, by issuing said Service Letter, the said Company has prevented this plaintiff from securing employment with any other railroad company, and that therefore, this plaintiff has been damaged in the sum of Twenty Thousand Dollars ($20,000.00)."

There is no allegation in the amended petition of the existence of a custom of the railroad company to give service letters to its employees in the absence of a duty imposed by the Service Letter statute. There are no facts alleged creating a legal duty on the part of the plaintiff in error to give defendant in error a service letter aside from the service letter statute. There is no allegation of the utterance or publication of the letter by anyone except the defendant in error himself. The allegations of the amended petition follow very closely the language of the service letter statute, the opening portion of which we quote for comparison with the portions of the amended petition above quoted.

Sec. 2769. "Whenever any employee of a public service corporation, or of a contractor who works for such corporation, doing business in this state, shall be discharged or voluntarily quits the service of such employer, it shall be the duty of the Superintendent, or manager, or contractor for, upon the request of such employee to issue to such employee a letter setting forth the nature of the service rendered by such employee to such corporation or contractor and the duration thereof and truly stating the cause for which such employee was discharged from or quit such service;" etc.

(b) Answer.

The answer of the plaintiff in error challenged the statute upon which it specifically alleged defendant in error's cause of action was based, said paragraph of the answer being as follows:

Tr. p. 20. "This defendant avers that said statute of the State of Oklahoma upon which plaintiff bases his action, and for which plaintiff seeks damages by reason of the breach of the same by this defendant, was at date of its passage and approval and at the date of the issuance of the service letter set out by the plaintiff therein as Exhibit "B" was unconstitutional and void, and deprived this defendant of due process of law and the equal protection of the law as guaranteed to him under the 14th Amendment of the Constitution of the United States, and Section 7 Article 2 of the Constitution of the State of Oklahoma; and for the further reason that said statute violates Section 22 of Article 2 of the Constitution of the State of Oklahoma, in denying to this defendant freedom of speech and the press, including the right to remain silent."

No reply was filed to this answer and the issues tried before a jury were upon the character of the service letter and the truthfulness of its contents as measured by the Oklahoma service letter statute.

(c) Court's Instructions.

Instructions given by the trial court indicate clearly to our minds that the jury were instructed upon the theory that the service letter complained of was given in compliance with the duty imposed by the service letter statute. Two of defendant's requested instructions, No. 5 and No. 7 (Tr. p. 73) were adopted by the trial judge and incorporated in the instructions which he gave to the jury on the theory just suggested. We quote paragraphs three, four and five of the trial court's instructions to show that his understanding of the plaintiff's theory was that it was brought under the service letter statute.

Tr. p. 75. "3. You are instructed, gentlemen of the jury that even though you should find from the

evidence that the service letter does not state the true cause for the discharge of the plaintiff from the service of the Chicago, Rock Island & Pacific Railway Company, nevertheless your verdict shall be for the defendant, unless you further find that the plaintiff has suffered damage by reason of his failure to obtain employment as a switchman on account of the statements in the service letter.

4. You are instructed that before you can award any damages to the plaintiff if any, the proof must show by a preponderance of the evidence; (1), that the contents of the said service letter were false; (2) that he was, at the time he alleges he sustained the said damages a man of ordinary physical ability, able to perform the work of an average man in the line in which he was making application and (3), that he was prevented from obtaining said employment for which he, at that time, was making application, by reason of the statements contained in the alleged false service letter, which has been set out and introduced in evidence before you, and if you find and believe from the evidence that the contents of the said service letter were true or that he was not a man of ordinary physical ability, able to perform the work of an ordinary individual in the line of employment in which he was making application for work or that he was not prevented from obtaining employment from the parties to whom said application was made by reason of the statements contained in the said service letter herein, set out, you are instructed that the plaintiff has failed to prove his cause of action, as alleged, and your verdict should be for the defendant.

5. You are instructed that if the plaintiff was issued a service letter as alleged in the petition and that said letter contained a statement relative to the reason for plaintiff's dismissal, and said statement was untrue, and that because of the issuance of said letter containing said untrue statement said plaintiff has been denied employment by other railroad companies, then your verdict should be for the plaintiff in such sum as you find from the evidence he has been damaged as the direct and proximate result thereof."

(d) Opinion of Oklahoma Supreme Court.

The opinion of the Supreme Court of Oklahoma found in the transcript of the record at pages 89 to 108 follows, we think, exclusively and necessarily the theory of the plaintiff as shown by his petition and answer thereto and the trial court's instructions quoted above. Paragraphs 1 (a), 2, 3 and 4 of the syllabus prepared by the court and setting forth the holding of the court as outlined in the opinion following, we contend support unquestionably the contention that the theory of plaintiff's petition was, that his cause of action arose by reason of the plaintiff in error's alleged violation of the obligations imposed by the Oklahoma service letter statute. The following paragraphs of the opinion also support the above contention, in our judgment.

Tr. p. 98. "We hold that there is no merit in this contention, as we find that the testimony of the plaintiff tends strongly to show affirmatively that the service letter did not truly state the cause of the discharge, and the testimony offered by the defendant negatively tended to prove the same thing, in that it practically all tended to show that the real cause of the plaintiff's dismissal from the service of the railway company was because he was physically incapacitated for the duties of switchman, and that the trial court's refusal to give the peremptory instructions was not error. *M., O. & G. Ry. Co.* v. *Davis*, 54 Okla. 672, 154 Pac. 503; *Menten* v. *Richards*, 54 Okla. 418, 153 Pac. 1177; *Mountcastle* v. *Miller*, 166 Pac. 1057."

The remainder of the court's opinion up to page 107 of the transcript of the record is given over to a discussion of the constitutionality of the Oklahoma service letter statute. A previous portion of the opinion from page 91 to page 98 of the transcript of the record was taken up with a summary of the evidence. In fact the entire opinion of the court with the exception of the last two pages (Tr. p. 107, 108) is based upon the con-

stitutionality of the service letter statute which t expressly uphold in the following paragraph:

Tr. p. 104. "We think that the legislation attacked does not deny to the defendant due process of law, that it does not constitute an illegal infringement upon the right to contract and that it is within the police power of the state."

The same holding is stated in the second numbered paragraph of the syllabus which is as follows:

Tr. p. 90. "2. Section 2769 Rev. Laws of Okla. 1910, requiring that public service corporations give to employees discharged or leaving the service, a letter stating the nature of the service rendered, and the cause for which the employee was discharged or quit the service, does not deny to such public service corporations due process of law, and is not violative of Sec. 7, Art. 2, of the Constitution of Oklahoma, nor of the Constitution of the United States, or the fourteenth Amendment."

In support of their motion to dismiss for want of jurisdiction, counsel set out their contentions under the heading "Argument and Authorities" which we shall quote here because we desire to refer to it at this place:

Brief p. 11. "We contend, most seriously, that the plaintiff in error Railway Company, *having seen proper of its own violation to give to the defendant in error upon his dismissal from service a clearance or service letter which was false,* that it will not be heard to say that it gave the letter in obedience to an unconstitutional statute and that, therefore, no matter if the letter was false, and the defendant in error plead and was able to prove to the satisfaction of a jury that he had suffered special damages, that relief should be granted through an attack upon the law of the state as being repugnant to the Federal Constitution.

We cannot believe that the 14th amendment to the Federal Constitution, or any other amendment to, or section thereof, was intended to, or in fact, can be used

for the protection of one who makes false statements in regard to another which, with their innuendoes, is damaging and derogatory and causes special damage which is plead and proven.

If this suit had been brought for a failure to give the letter or otherwise obey this statute, then the question of its constitutionality could be urged. Under the facts of this case, we feel like it ought not to be urged by plaintiff in error or considered by the Court. The custom and habit of giving service letters, or, as they are sometimes called, clearances, to employees quitting a master's service, is far older than any of the statutes such as the one under consideration, and it ought to be assumed that if the service letter law of Oklahoma is unconstitutional, that the Railway Company had knowledge of that fact and that the service letter in question was not, therefore, given at the behest of the statute thereof, but rather because of the general custom so to do, unless indeed it might have had a more sinister purpose.

It is true that the Supreme Court of Oklahoma in its decision upheld the validity of the statute in question as being a law that the State was competent to pass as a proper exercise of its police power, but it was quite unnecessary for the court to do so, and this was pointed out to the Court, and we believe that the fact that it did so is no reason why this Honorable Court should be called upon to exercise its jurisdiction simply because the Supreme Court of Oklahoma did an unnecessary thing."

We have italicised the above passage because it thus appears in the brief from which we quote.

Counsel says that the contention is most seriously made, that the Railway Company "of its own volition" issued the service letter. The following quotation from the testimony of the defendant in error at the trial of the cause shows that the service letter was issued only after it had been requested more than once. Defendant in error testified:

Tr. p. 34. "Q. Ask you if you had any further conversation with the Superintendent before the issuance of this letter, this service letter?

By Mr. Shartel: Objected to as immaterial and irrelevant and too indefinite.

By the Court: Overruled.

By Mr. Shartel: Exceptions.

A. Yes, I asked him for a service letter two or three times and he said he would give me one.

* * * * * *

P. 35. Q. When did you ask him for your service letter?

A. Why as soon as he said he could not do anything for me any more.

Q. And that was in January, 1914?

A. Yes, sir.

Q. Now when did you get this service letter?

By Mr. Shartel: Objected to as immaterial and irrelevant to any issue here.

By the Court: Sustained.

Q. Did you get a service letter?

A. Yes, sir.

Q. I hand you paper marked Exhibit "B" and ask you to state what that is?

A. This is the service letter he gave me."

We do not understand upon what evidence the conclusion stated in italics above was based in view of the evidence just quoted. The letter shows how closely it complied with the service letter statute both as to the form required and the character of the contents which required "truly stating the cause for which such an employee was discharged from or quit such service."

We address these remarks to the first paragraph of the quotation made above from defendant in error's brief. In the second paragraph of that quotation counsel assume the making of "false statements in regard to another" but do not refer to any right at common law, in a constitution or statute for which he may recover damages. The Supreme Court of Oklahoma in opinion holds that there is no common law duty to give any kind of a service letter. They also quote from Labatt on Master and Servant, which states the rule to be the same in both English and American courts. This portion of the opinion is as follows:

TR. p. 100. "The common law recognized a moral obligation resting upon the employers to give a 'character' to servants leaving the employment of their masters but no legal obligation of this nature existed until laws touching these matters were enacted. Labatt in his 'Master and Servant' Vol. 5, Sec. 2013, 1014, says:

"The Doctrine of the English and American courts is that a master is morally, but not legally bound to give a character to the servant when he is discharged from or leaves the employment."

With reference to the third paragraph of the brief of the defendant in error above quoted, we insist that this is essentially a suit "brought for a failure to give the letter or otherwise obey this statute." No custom or habit of giving service letters independently of the statute was pleaded or proved; but on the contrary evidence was introduced to show that neither the plaintiff nor any other person seeking employment would be prevented from obtaining it on the Chicago, Rock Island Pacific railroad or that of the Iron Mountain, Frisco or the roads generally in the Southwestern part of the United States with which the Superintendents from the Rock Island, Iron Mountain and Frisco were familiar.

It is suggested in this paragraph that the railway company should know that the service letter was not "given at the behest of the statute" but because of the general custom. We think it clear that this contention cannot stand.

In the fourth paragraph of the quotation made from defendant in error's brief the admission is made that the Oklahoma Supreme Court upheld the validity of the statute but it is contended that "it was quite unnecessary for the court to do so and this was pointed out to the Court." Apparently the Supreme Court of Oklahoma did not take the same view of this question that counsel for defendant in error did. The opinion as it appears in the transcript shows that from its beginning on page 91 to page 98 the Court deals solely with a summary of the issues and the evidence. After stating that the motion to direct the verdict was properly overruled, they state the question which in their judgment is necessary to be decided in this case together with the specification in error raising it as follows:

Tr. p. 98. "The defendant's second specification of error is: 'The court erred in failing to direct a verdict for the defendant as requested because the service letter statute in which recovery was sought, violated the provisions of the Constitution of Oklahoma as set forth in Secs. 7 and 22, Art. 2, because it denied to the defendant, federal rights guaranteed under the Constitution of the United States, and the Fourteenth Amendment thereof.'

We are, therefore, called upon to determine the constitutionalty of the Service Letter Law, to-wit: Section 2769, Rev. Laws 1910, which reads:"

If there had been any other theory upon which to uphold the judgment of the trial court, it is our understanding that the Supreme Court of Oklahoma would

have avoided the determination of the question of the constitutionality of this statute. We are confirmed in this idea by the expression found later in the opinion which is as follows:

Tr. p. 105. "We have not heretofore been called upon to construe the service letter law but in two instances we expressed our belief in its constitutionality, *C. R. I. & P. Ry. Co.* v. *Hall——Okla.——*, 169 Pac. 851, 853; *St. L. & S. F. Ry. Co. et al.* v. *Fitzmartin*, 39 Okla. 654, 666, 136 Pac. 654."

Counsel have reiterated a number of times in their brief that the decision upon the service letter statute was not necessary in order to affirm the judgment. They have, however, wholly failed to suggest any other theory upon which a recovery might have been allowed and the judgment affirmed. Much was said in the brief of the defendant in error in the Oklahoma Supreme Court along the lines discussed by Justice Johnson in the opinion on the old evil of black-listing and the subjection of employees to disabilities and restrictions and the inequality of the employee and the master with reference to the terms and conditions of employment. It was this, we understand, that counsel had in mind when they stated in the fourth paragraph of our quotation from their brief that they pointed out to the court how unnecessary it was for it to decide that the service letter statute was constitutional in order to affirm their judgment. This argument however with reference to general conditions and the rights of labor to privileges to offset the fancied advantages of capital were not the basis upon which the suit was brought, tried and contested in the appellate court and, as we understand it, does not constitute a ground of recovery in courts of law. It may be that it is a splendid argument in the minds of the public or of legisla-

ture, whose duty it is to deal with legislation respecting these subjects. Something more substantial, however, is necessary before a judgment can be affirmed which takes property of a corporation and transfers it to an individual if the phrase "due process of law" and "equal protection of the law" are to have the meaning customarily ascribed to them in the courts of law.

We feel sure that a careful perusal of the record will convince the reader that this alleged cause of action was based, tried and affirmed by the Supreme Court of Oklahoma on the service letter statute only and that this record, therefore, does draw "in question * * * * the validity of a statute of, or authority exercised under the laws of the State of Oklahoma."

II. *The transcript of record shows that the service letter statute of Oklahoma was "drawn in question," "upon the ground that the same is repugnant to the constitution, treaties or laws of the United States."*

The plaintiff in error's first challenge to the constitutionality of the service letter statute is found in its answer to the amended petition (tr. p. 20) where it was averred "that said statute of the state of Oklahoma upon which plaintiff bases his action * * * was unconstitutional and void and deprived this defendant of due process of law and the equal protection of the law as guaranteed to him under the 14th Amendment of the Constitution of the United States," etc. (Tr. p. 20, 32.)

This challenge was renewed by a requested instruction by the plaintiff in error which was refused by the

trial court, to which action an exception was allowed. The instruction is as follows:

Tr. p. 73, 110. "You are instructed that you will allow the plaintiff no damages by reason of the issuance to him of a false service letter in violation of the statute of Oklahoma requiring said issuance of a service letter for the reason that the statute of the State of Oklahoma is in violation of the Constitution of the United States and the Fourteenth Amendment thereof and denies to this defendant due process of law and the equal protection of the law."

This challenge was recognized by the Supreme Court of Oklahoma in its opinion which has been previously quoted. We quote it again here for convenience:

Tr. p. 98. "The defendant's second specification is:

'The court erred in failing to direct a verdict for the defendant as requested because the service letter statute in which recovery was sought, violated the provisions of the Constitution of Oklahoma as set forth in Sec. 7 and 22, Art. 2, because it denied to the defendant, federal rights guaranteed under the Constitution of the United States, and the Fourteenth Amendment thereof.'

We are, therefore, called upon to determine the constitutionality of the Service Letter Law, to-wit: Section 2769, Rev. Laws 1910, which reads:"

The holding of the Oklahoma Supreme Court in answer to the question above stated by it is expressed in the following paragraph requoted here for convenience:

Tr. p. 104. "We think that the legislation attacked does not deny to the defendant due process of law, that it does not constitute an illegal infringement upon the right to contract and that it is within the police power of the state."

We think it is clear from the portion of the answer

quoted the plaintiff in error's requested instruction, which was refused, and the statement of the question by the Supreme Court of Oklahoma in its opinion, and the decision thereon, that the service letter statute of Oklahoma was attacked upon "the ground that same is repugnant to the Constitution, treaties or laws of the United States."

(a) Judgment Violates Due Process of Law.

The Oklahoma Service Letter Statute was not only attacked on the ground that it was repugnant to the Constitution of the United States as amended but the grounds of the attack were clearly set out and argument in favor of the same offered in the brief filed in the Oklahoma Supreme Court.

The court in its opinion which has been previously quoted admitted that there was no common law duty which required masters to give to their servants leaving their service a service letter and that the only obligation to give a servant a "character" was a moral one. (Tr. p. 100.) This was supported by a quotation from Labatt on Master and Servant, Vol. 5, Sec. 2013, 2014 in which it was stated that there was no legal obligation on the part of masters to give service letters to their servants under the doctrine announced by the English and American courts.

We have previously referred in a portion of this argument dealing with the theory upon which the action was brought to the absence of any allegation of a custom under which masters gave their servants service letters on railroads from this portion of the United States. We have also referred at that place to the absence of any showing that the issuance of this

service letter under the circumstances to the plaintiff was a slander uttered or a libel published, publication if any being solely by defendant in error. We also desire to call the court's attention to the fact that no other theory has been advanced upon which plaintiff's recovery might be allowed or the judgment affirmed.

It was further contended, as shown by the record, that the giving of this service letter to the plaintiff under the terms imposed by the Oklahoma service letter statute amounted to the denial of due process of law.

(b) Judgment Denies Equal Protection of the Law.

The attack on the judgment was made also upon the ground that it denied to this defendant the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. This ground is urged because of the absence of a common law duty on the part of the master to give a service letter to a servant; because the facts alleged in our judgment failed to amount to a slander uttered against the defendant in error or a libel published against him and because no allegations on either of these theories were made in the amended petition, upon which the case was tried; and because there were no facts alleged or proved showing a custom on the part of the railroads to give service letters to their servants.

The act was also attacked on the ground that it was directed against public service corporations and contractors employed by them and did not include other corporations or partnerships or individuals who might employ men in the same kinds of work and under sim-

ilar working conditions, upon whom the duty to give a service letter to a servant was not imposed.

Corporations have been held to be included within the scope of the term "person" as used in the Fourteenth Amendment. *Smyth* v. *Ames*, (1898) 169 U. S. 466, 42 L. Ed. 819.

The alleged custom of "black-listing" was the evil against which service letter statutes were presumably directed. Labatt on Master and Servant, Vol. 5, Sec. 2013, 2014, 2031 cited in the opinion of the Oklahoma Supreme Court (tr. p. 100, 101.)

The legislature of Oklahoma did not see fit to impose upon other corporations, partnerships and individuals employing servants the duty to give a service letter to a servant upon request. Other corporations, partnerships or individuals employ men in numbers sufficiently large and under conditions sufficiently similar to come within this class, in our judgment. The steel companies of the United States, cotton mills, powder factories packing plant industry, coal mining industry, the milling industry, the oil industry, the automobile factories and plants and numerous other manufacturing enterprises employ servants in large numbers and under similar circumstances and conditions to those employed by public service companies. Some of the industries are prominent in Oklahoma. All of them are prominent in the industrial world of the United States. The burden imposed upon public service companies that is not imposed upon other corporations, partnerships or individuals employing labor and dealing with its representatives under similar conditions and carrying on its business under similar working conditions amounts in our judgment to a discrimination. The classification which sets apart public service companies

from these other enterprises is not based upon the inherent difference or characteristic peculiar to the public service company but is unreasonable and arbitrary and in our judgment denies to these public services the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. In the case of *State* v. *Nashville C. & St. L. Ry. Co.* (1911) 104 Tenn. 1, 135 SW 773, the Supreme Court of Tennessee held unconstitutional a statute which prohibited corporations from discharging employees in their service for voting or not voting in any election. The court said the classification was not based upon any reasonable or substantial differences peculiar to their employment but was arbitrary and a violation of the Fourteenth Amendment.

In *Bedford Quarries Co.* v. *Bough* (1907) 168 Ind. 671, 80 NE 529, 14 L. R. A. (NS) 418 the Supreme Court of Indiana held unconstitutional the Indiana Employer's Liability Act which provided "that every railroad or other corporations, except municipal, operated in this state shall be liable," etc., because the classification had no reasonable basis upon which to stand and because the legislation did not operate equally upon all within the class. Cases cited from Mississippi, California, Minnesota and the Supreme Court of United States in support of that decision.

In *Hatfield* v. *Garnett* (1915) 45 Okla. 438, 146 Pac. 24, held unconstitutional a statute classifying counties because the basis of the classification did not conform to the rule that the act must be general in its nature and uniform in its operation and operate equally upon all counties within the class.

The Supreme Court of the United States in a number of cases has announced the same rule and consis-

tently applied it. In *Soon Hing* v. *Crowley* (1885) 113 U. S. 703, 28 L. Ed 1145, Mr. Justice Field wrote the opinion for the court which held that, "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions."

In *Gulf C. & S. F. R. Co.* v. *Ellis* (1897) 165 U. S. 150, 41 L. Ed. 666, Mr. Justice Brewer wrote the opinion of the court which held unconstitutional a statute of the state of Texas authorizing the recovery of an attorney's fee by a plaintiff in certain claims against the railway company where the same were not paid within a time provided by the act.

In *Connolly* v. *Union Sewer Pipe Company* (1901) 184 U. S. 539, 46, L. Ed. 679, Mr. Justice Harlan wrote the opinion of the court which held unconstitutional an anti-trust law of the State of Illinois which exempted farmers from the prohibitions contained in the act. The act was attacked on the ground that the classification was arbitrary and unreasonable and therefore unconstitutional. The following portion of the opinion sets out fully the standard which we believe has been adopted by the Supreme Court of the United States and which we think shows the Oklahoma Service Letter statute to be based upon a classification both arbitrary and unreasonable and which makes the act unconstitutional. The court said:

P. 689. "What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution. No rule can be formulated that will cover every case. But

upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' *Missouri* v. *Lewis*, 101 U. S. 22, 31, sub nom. *Bowman* v. *Lewis*, 25 L. Ed. 989, 992. We have also said: 'The Fourteenth Amendment, in declaring that no state "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediments should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' *Barbier* v. *Connolly*, 113, U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, 359. This language was cited with approval in *Yick Wo* v. *Hopkins*, 118, U. S. 356, 369, 30 L. Ed. 220, 226, 6 Sup. Ct. 1064, 1070, in which it was also said that 'the equal protection of the laws is a pledge of the protection of the equal laws.' In *Hayes* v. *Missouri*, 120, U. S. 68, 71, 30 L. Ed. 578, 580, 7 Sup. Ct. Rep. 350, 352, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory, within which it is to operate, 'shall be treated alike, under like circumstances and conditions both in privileges conferred and in the liabilities im-

posed.' 'Due process of law and the equal protection of the laws,' this court has said, 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' *Duncan* v. *Missouri*, 152 U. S. 377, 382, 38 L. Ed. 485, 487, 14 Sup. Ct. Rep. 570, 572. Many other cases in this court are to the like effect."

The record discloses, clearly both that the Oklahoma service letter statute was attacked on the ground that it was repugnant to the Constitution of the United States as amended, and the fact that the Supreme Court of Oklahoma in affirming the judgment of the trial court denied to this plaintiff in error due process of law and the equal protection of the laws as shown in the above citations and quotations.

III. CONCLUSION

As indicated in the opening portion of defendant in error's brief and motion to dismiss for want of jurisdiction, they contend that no federal question was presented and that the decision holding the Oklahoma Service Letter statute constitutional was unnecessary to the affirmance of the judgment of the trial court and therefore this court should not take jurisdiction of this case upon writ of error. We have set our facts and quotations from the record which in our judgment shows that a Federal question is necessarily presented by the record and that the holding of the Oklahoma Supreme Court that the service letter statute was constitutional was necessary in order to affirm the judgment of the trial court.

It does not seem to us that counsel's contention that the cause of action was not based upon the service letter statute is sound. We are brought to this belief

by the facts disclosed by the record and also by the fact that counsel has suggested no other theory upon which the judgment might be affirmed by the Supreme Court of Oklahoma, or by this court, and no ingenuity can so construe the petition as stating a cause of action unless it be upon the statute. And the record contains ample evidence both of the fact that the statute assailed was drawn in question as to its validity and that the ground of the attack was its repugnancy to the United States Constitution.

Counsel's contention that the plaintiff in error *"of its own volition"* issued the service letter, is conclusively rebutted by plaintiff's testimony that he "asked him for a service letter two or three times and he said he would give me one" (tr. p. 34), and his identification of the service letter offered in evidence as Exhibit "B" (p. 36) as the service letter given to him in accordance with this request (tr. p. 35).

For these reasons we respectfully maintain that this court has jurisdiction of this cause upon writ of error.

Respectfully submitted,

C. O. Blake,
W. R. Bleakmore,
Raymond A. Tolbert,
Roy S. Lewis,
John W. Willmott,
R. J. Roberts,

August 24, 1920.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. [redacted]19

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

DANIEL J. PERRY, *Defendant in Error.*

ANSWER BRIEF OF DEFENDANT IN ERROR

INDEX.

CASES CITED.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. 157

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

DANIEL J. PERRY, *Defendant in Error.*

ANSWER BRIEF OF DEFENDANT IN ERROR

At the proper time, after the filing of the petition in error in this case, the defendant in error filed a motion to dismiss the petition in error, advancing argument why, in the judgment of his counsel, the motion should be sustained. Later, the defendant in error

was notified that consideration of the motion to dismiss had been postponed until the case was submitted on its merits. The defendant in error, believing that his motion is well taken, hopes to serve the convenience of the Court, by reprinting same in this brief, which also goes to the merits.

ON THE MOTION TO DISMISS FOR WANT OF JURISDICTION.

This proceeding in error prosecuted from the decision and judgment of the Supreme Court of the State of Oklahoma, does not, necessarily, present a federal question, because there is not drawn in question the validity of any treaty or statute of or authority exercised under the United States, or the validity of a statute of, or authority exercised under the laws of the State of Oklahoma, upon the ground that same is repugnant to the constitution, treaties or laws of the United States, and this defendant in error believes that this will be manifest upon the face of the record filed herein.

STATEMENT.

The amended petition filed by defendant in error in a District Court of the State of Oklahoma is set out in the printed record beginning with page 15, and, summarized, alleges substantially that defendant in error had been theretofore, for a long time, in the employment of the Railway Company as a switchman, and while engaged in such employment, without fault upon his part, but because of the fault and negligence

of the railway company, had been thrown from a box car and seriously injured. That while in the hospital at the railway company's expense and without any claim for damages upon his part, and without any attorney representing him, the railway company offered to pay him, and did pay him, a sum of money in settlement for his injuries. That later, when able to resume work, he returned to the place of his former employment and reported for duty, delivered to the general yard master a certificate from the company's physician that he was able to resume work, but that he was not re-employed, but was advised that he was out of the service because—ineligible for duty. That thereafter on August 18th, 1915, the railway company, through its superintendent, gave the defendant in error a service letter, as follows

"Haileyville, Okla., Aug. 18, 1915.

"This is to certify: That, Daniel Jackson Perry has been employed on the Indian Territory Division of the Chicago, Rock Island and Pacific Railway Company as switchman from November 1st, 1904, until July 1st, 1913.

"Dismissed: Account responsibility in case of personal injury to himself June 30th, 1913. Services otherwise satisfactory.

"H. F. Redding,
"Superintendent."

That defendant in error thereafter tried to secure employment from the plaintiff in error railway, but was refused on account of the statements in said service letter; that he sought employment from various railway companies, naming them, both in Oklahoma and Texas, but upon examination of the service letter, al-

though the railway company applied to for employment was in need of such services as he was competent to render, they uniformly refused to employ him because of the statement in the letter:

> "Dismissed account responsibility in case of personal injury to himself June 30th, 1913."

The petition then continues as follows:

> "Plaintiff alleges that the issuance of said letter, and the contents of that letter, which said letter did not truly state the facts, or give the true reason for his discharge, constitute the proximate cause of the refusal of all other railroad corporations to employ this plaintiff, and of the damages he sustained by being prevented from obtaining employment; and that the refusal of other railroad corporations to employ this plaintiff is due directly and proximately to the issuance and contents of said service letter.
>
> "Plaintiff further alleges that the said letter, upon its face, charges this plaintiff with being responsible, directly, for the injury which he sustained on June 30th, 1913, and said statement is untrue, and at the time of the issuance of said letter was known to be untrue by defendant; but that, said plaintiff alleges, said railway company admitted its liability for said accident, which resulted in plaintiff's injury, by making a settlement with this plaintiff for said injury, by caring for him in its hospital, both in Shawnee and in Chicago, and rendering professional services free to this plaintiff.
>
> "Plaintiff further alleges that said settlement on the part of the plaintiff, and on the part of the defendant railway company, was made with the advice and sanction only of the defendant railway company's physicians and attorneys, and this plaintiff, while at the hospital, was not permitted to see

any attorney, and when his own attorney called, this plaintiff was not permitted to see him, and that he never did see or consult an attorney in regard to his matters until after this settlement; but plaintiff alleges that by virtue of this settlement the defendant company admitted its own liability, and that, therefore, the statements and things set forth in said service letter were known by defendant to be not true, but that said service letter was issued to plaintiff for the purpose of preventing this plaintiff from securing employment either with the defendant company, or with any other railroad company; and that, by issuing said service letter, the said company has prevented this plaintiff from securing employment with any other railroad company, and that, therefore, this plaintiff has been damaged in the sum of twenty thousand dollars ($20,000.00.)"

To this petition the plaintiff in error railway company answered in the court below by a general denial of all of the allegations of the petition, and

"II.

"This defendant avers that said statute of the State of Oklahoma upon which plaintiff bases his action, and for which plaintiff seeks damages by reason of the breach of the same by this defendant, was at date of its passage and approval and at the date of the issuance of the service letter set out by the plaintiff therein as Exhibit 'B,' was unconstitutional and void, and deprived this defendant of due process of law and the equal protection of the law as guaranteed to him under the 14th amendment of the Constitution of the United States, and Section 7 of Article 2 of the Constitution of the State of Oklahoma; and for the further reason that said statute violates Section 22 of Article 2 of the Constitution of the State of Oklahoma, in de-

nying to this defendant freedom of speech and the press, including the right to remain silent."

The case was tried before a jury in the District Court of Oklahoma County, Oklahoma, upon the issue raised by the general denial, under instructions of the court upon the theory of the plaintiff that the allegation in the letter—

> "Dismissed account responsibility in case of personal injury to himself June 30th, 1913,"

was false and untrue and was derogatory and damaging to defendant in error in that it prevented him from obtaining employment from plaintiff in error railway and all other railways in the only line of work in which he had spent his life and was competent. He alleged and proved special damages and was awarded a judgment for $3000.00 under this theory.

To show that the issue tried to the court was solely that of the question as to whether or not the statements made were false and derogatory and whether or not the defendant in error had suffered damage thereby, we refer to the instructions of the trial court commencing at page 74 printed record, wherein the court, after stating the issues to the jury, and defining the burden of proof, instructed the jury:

> "You are instructed, gentlemen of the jury, that even though you should find from the evidence that the service letter does not state the true cause for the discharge of the plaintiff from the service of the Chicago, Rock Island & Pacific Railway Company, nevertheless your verdict shall be for the defendant, unless you further find that the plaintiff has suffered damage by reason of his

failure to obtain employment as a switchman on account of the statements in the service letter.

"You are instructed that before you can award any damages to the plaintiff, if any, the proof must show by a preponderance of the evidence: (1) That the contents of the said service letter was false; (2) that he was, at the time he alleges he sustained the said damages, a man of ordinary physical ability, able to perform the work of an average man in the line in which he was making application; and (3) that he was prevented from obtaining said employment for which he, at that time, was making application, by reason of the statements contained in the alleged false service letter, which has been set out and introduced in evidence before you, and if you find and believe from the evidence that the contents of the said service letter were true or that he was not a man of ordinary physical ability, able to perform the work of an ordinary individual in the line of employment in which he was making application for work or that he was not prevented from obtaining employment from the parties to whom said application was made by reason of the statements contained in the said service letter herein set out, you are instructed that the plaintiff has failed to prove his cause of action, as alleged, and your verdict should be for the defendant.

"You are instructed that if the plaintiff was issued a service letter as alleged in the petition and that said letter contained a statement relative to the reason for plaintiff's dismissal, and said statement was untrue, and that because of the issuance of said letter containing said untrue statement said plaintiff has been denied employment by other railroad companies, then your verdict should be for the plaintiff in such sum as you find from

the evidence he has been damaged as the direct and proximate result thereof."

Under the issue so before it and the instructions of the court, the trial jury found a general verdict for the defendant in error in the sum of $3000.00, and this necessarily involved a finding by the jury that the railway company had made false statements in writing against the defendant in error and that he has furnished proof of special damages in the amount of the verdict found.

In the assignment of errors (pages 6 and 7 printed record) plaintiff in error has through the medium of ten separate assignments complained that the Supreme Court of the State of Oklahoma erred in holding that the provisions of Chapter 53, Article 3, of the Session Laws of the State of Oklahoma for the years 1907-08, page 516, are not in conflict with and in violation of the provisions of the 14th amendment of the Constitution of the United States, for that the State of Oklahoma by and through the provisions of said Chapter 53, assumes and seeks:

"(a) To deprive the plaintiff in error of rights, privileges and immunities secured to it.

"(b) To deprive the plaintiff in error of property without due process of law.

"(c) To deprive and to deny to the plaintiff in error, within the jurisdiction of the State of Oklahoma, the equal protection of the law."

And that the Supreme Court erred in affirming the action of the trial court in refusing to give to the jury the defendant's (railway company's) instruction

No. 4, which said instruction in words and figures is as follows:

> "No. 4. You are instructed that you will allow the plaintiff no damages by reason of the issuance to him of a false service letter in violation of the statute of Oklahoma requiring said issuance of a service letter, for the reason that the statute of the State of Oklahoma is in violation of the Constitution of the United States and the Fourteenth Amendment thereof, and denies to this defendant due process of law and the equal protection of the law."

The statute of Oklahoma complained of is found in Volume One, Revised Laws of 1910, Section 3769, and is as follows:

> "CORPORATION TO GIVE LETTER TO EMPLOYEE LEAVING SERVICE. Whenever any employee of any public service corporation, or of a contractor, who works for such corporation, doing business in this State, shall be discharged or voluntarily quits the service of such employer, it shall be the duty of the superintendent or manager, or contractor, upon request of such employee, to issue to such employee a letter setting forth the nature of the service rendered by such employee to such corporation or contractor and the duration thereof, and truly stating the cause for which such employee was discharged from or quit such service; and, if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employee, when so requested, or shall wilfully or negligently refuse or fail to state the facts correctly, such superintendent, manager or contractor shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the

county jail for a period of not less than one month and not exceeding one year; Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employee. No printed blank shall be used, and if such letter be written upon a typewriter, it shall be signed with pen and black ink and immediately beneath such signature shall be affixed the officia stamp, or seal, of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters used upon such piece of paper, except such as are plainly essential, either in the date line, address, the body of the letter or the signature and seal or stamp thereafter, and no such letter shall have any picture, imprint, character, design, device, impression or mark, either in the body thereof or upon the face or back thereof, and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above prescribed."

ARGUMENT AND AUTHORITIES.

We contend, most seriously, that the plaintiff in error Railway Company, *having seen proper of its own volition to give to the defendant in error upon his dismissal from service a clearance or service letter which was false,* that it will not be heard to say that it gave the letter in obedience to an unconstitutional statute and that, therefore, no matter if the letter was false, and the defendant in error plead and was able to prove to the satisfaction of a jury that he had suffered special damages, that relief should be granted it through an attack upon the law of the state as being repugnant to the Federal Constitution.

We cannot believe that the 14th amendment to the Federal Constitution, or any other amendment to, or section thereof, was intended to, or in fact, can be used for the protection of one who makes false statements in regard to another which, with their innuendoes, is damaging and derogatory and causes special damage which is plead and proven.

If this suit had been brought for a failure to give the letter or otherwise obey this statute, then the question of its constitutionality could be urged. Under the facts of this case, we feel like it ought not to be urged by plaintiff in error or considered by the court. The custom and habit of giving service letters, or, as they are sometimes called, clearances, to employees quitting

a master's service, is far older than any of the statutes such as the one under consideration, and it ought to be assumed that if the service letter law of Oklahoma is unconstitutional, that the Railway Company had knowledge of that fact and that the service letter in question was not, therefore, given at the behest of the statute thereof, but rather because of the general custom so to do, unless indeed it might have had a more sinister purpose.

It is true that the Supreme Court of Oklahoma in its decision upheld the validity of the statute in question as being a law that the State was competent to pass as a proper exercise of its police power, but it was quite unnecessary for the court to do so, and this was pointed out to the Court, and we believe that the fact that it did so is no reason why this Honorable Court should be called upon to exercise its jurisdiction simply because the Supreme Court of Oklahoma did an unnecessary thing.

This Court, of course, is entirely familiar with its long line of decisions commencing in 1827 in *Montgomery* v. *Hernandes*, 12 Wheat. 129, that—

> "To give the court jurisdiction it must appear affirmatively, not only that the Federal question was presented for decision, but that its decision was necessary to a determination of the cause, and that it was actually decided."

We also invoke the rule of this Honorable Court that it will refuse jurisdiction unless a real and not fictitious Federal question is involved. *Millinger* v. *Hartupee*, 73 U. S. 258 (1867); *Parker* v. *McLain*, 237 U. S. 469 (1915), and many other cases.

In fact in conclusion we urge that the attitude of the plaintiff in error is fully shown in its Assignment of Error No. 9, Record 7, which complains of the refusal of the trial court to instruct the jury that no recovery of damages could be had

> " * * * BY REASON OF THE ISSUANCE TO HIM OF A FALSE SERVICE LETTER IN VIOLATION OF THE STATUTE OF OKLAHOMA," ETC.,

which is but another way of saying, that no matter if it did make false statements about the employee, and at the time knew them to be false; and no matter if these false statements did damage him, and he was able to prove his damage, it cannot be held liable because, on account of the service letter statute being unconstitutional, it was under no legal duty to give a letter, or to speak the truth if it did.

ON THE MERITS.

If this Honorable Court comes to the opinion, that there is NECESSARILY INVOLVED HERE a Federal question, then we shall undertake to maintain the proposition:

THAT THE STATUTE OF OKLAHOMA, COMMONLY CALLED "THE SERVICE LETTER LAW," IS NOT VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES; THAT THE LEGISLATURE WAS COMPETENT TO ENACT IT UNDER THE POLICE POWER OF THE STATE.

Under the Common Law it seems to have been regarded as a moral duty to give a servant leaving em-

ployment a letter, "character" or "clearance." but that there was no legal obligation to do so. Labatt's Master and Servant, Second Ed. 2013.

For a discussion of the injustice of refusing to give a faithful servant a character, see Paley's Moral and Political Philosophy Book 111, Pt. 1, Chap. 11.

The statutes of the various American States, such as the one under review, and of other countries affected by the English Common Law, are merely, what seems to us, worthy attempts to modify the Common Law to the extent of converting a moral obligation into a legal duty. In an editorial note to *Wabash R. Co.* v. *Young*, 4 L. R. A. (N. S.) 1096, it is said:

> "b. Master's Duty as Affected by Statute. In some jurisdictions the common-law rule has been modified by statutes applicable either to employers generally, or to employers of a particular class; and there seems to be good reason to anticipate that enactments of this type will be greatly multiplied in coming years. The desirability of thus supplying the deficiencies of the common law cannot be consistently disputed by anyone who is of opinion that it is proper to protect employees by legislation against 'blacklisting.' See III, infra. Manifestly the refusal to give a character may often be virtually the equivalent of 'blacklisting' so far as regards the injury inflicted on the servant. The statutes which have already been passed may be conveniently classified under two heads:"

The note then refers to the fact that nearly two hundred years ago it was provided by the Irish Statute, 2 Geo. I., Chap. 17, Sec. 4, that

> "On the discharge or putting way of any servant from his or her service, or upon such ser-

vant's regularly leaving his or her service, the master or mistress of such servant shall give a certificate in writing, under his or her hand, that such person who is therein named was his or her servant, and that he or she is discharged from the said service, and shall in the said discharge certify, if desired, or such master or mistress think fit, the behavior of such servant."

That statute seems to have had no judicial notice until the case of *Handley* v. *Moffatt*, Ir. Rep. 7 C. L. 104, 21 Week. Rep. 231, was before the English Court a century and a half after its passage. Australia, in its "Employers and Employees" Act of Victoria, 1890, dealt in a comprehensive way with the subject, providing for a certificate of discharge to a servant to be produced on any new hiring, and that no false certificate shall be given, etc. England, in the Merchant Shipping Act of 1894 (57-58 Victoria, Chap. 60), provided for a certificate of discharge for seamen, in a form to be approved by the board of trade, and this statute was but an enlargement of an earlier one passed in 1854 (17-18 Victoria, Chap. 104).

In Sec. 4551, U. S. Comp. Statutes 1901, p. 3089, it is provided that upon the discharge of a seaman the master of the ship shall sign and give him a certificate of discharge specifying the period of his service and the time and place of his discharge, in a prescribed form; and in Sec. 4553, U. S. Comp. Statutes 1901, that the master shall make and sign, in a prescribed form, a report of the conduct, character and qualifications of the person discharged.

Twenty or more of these United States, including Oklahoma, have enacted legislation regulating the con-

duct of employers of labor, when servants leave the service or are discharged therefrom. These statutes assume various forms, but are all apparently intended to prohibit blacklisting.

We have ventured to set out the above matter to show that, practically speaking, the universal legislative judgment is that the Common Law exemption of a master from a legal duty to give a certificate of discharge to a servant, is inimical to the common good of the people. The people, where the English Common Law prevails, through their legislative spokesmen, have declared in the only way they can express themselves, that their *general welfare is involved*, and if the general welfare is involved, and it is unless the legislative bodies are all mistaken, then legislation, such as is under review here, is within the very broad limits of the police power of the State.

The people who are employed in railroad work are specifically and particularly interested, and their welfare involved, in the object sought to be obtained by statutes requiring, upon discharge of a servant, a service letter giving the length, nature and quality of the service performed. The mass of the people generally are also interested in the matter, although somewhat indirectly. All the citizenship are interested in having men of skill and experience employed in operating railroads and other public service corporations. When a man is seeking such employment, such letter aids the proposed new employer in employing none but experienced and skillful men to operate the public carriers of passenger and freight. The body of the citizenship is interested in this being done. The comfort, conven-

ience, and even the lives of the traveling public are involved in the question of whether railroad servants are suitable and experienced in the line of work they are called upon to do. The employees are all interested in this matter for, if after long and faithful service for one employer, they must seek similar employment elsewhere, a service letter, if it shows previous good service, is an open unquestioned passport into the new employment. There is great doubt if a man could obtain employment in train service unless he could show by a service letter, or otherwise, that he had had former experience in the kind of service he was seeking. There was no proof in this case that railway managers require a service letter from applicants for employment, and they may not all do so, all the time; but that this is a general custom, ordinarily, seems to be so well known by all persons acquainted at all with railroad work that at least some of the courts have taken judicial knowledge of the fact. The Supreme Court of Missouri, in *Cheek* v. *Prudential Ins. Co.*, 192 S. W. 389, we believe, without proof of the fact noted this custom, for it says:

> "Prior to the enactment of this statute, a custom has grown up in this state, among railroad and other corporations, not to employ any applicant for a position until he gave the name of his last employer, and upon receiving the same, it would write to said former employer, making inquiry as to the cause of the applicant's discharge, if discharged, or his cause for leaving the service of said former company. If the information furnished was not satisfactory the applicant was refused employment. This custom became so widespread, and affected such vast numbers of laboring people that it became a public evil, and work-

ed great injustice and oppression upon large numbers of persons who earned their bread by the sweat of their faces."

"The statute quoted was enacted for the purpose of regulating that custom, not to destroy it (for it contained some good and useful elements, enabling the corporations of the state to ascertain the degree of the intelligence as well as the honesty, capacity and efficiency of those whom they wished to employ, for whose conduct they are responsible to the public and their fellow employees), and thereby remedy the evil which flowed therefrom."

And in *Cleveland, Cincinnati, Chicago & St. Louis R. R. Co.* v. *Charles Jenkins,* 174 Ill. 398; 62 L. R. A. 922, the second syllabi is as follows:

"2. Courts will take judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is conducted, and of the everyday practical operation of railroads."

And in the body of the above opinion the Court, after noting the fact that there was no legal obligation under the common law upon a master to give a servant a letter of discharge, then adds:

"It might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it. A character is not given for the benefit of the exemployee, although he may be either injured or benefited by reason of such character being given; nor does the right to give such a character arise out of a duty to the employee, *but the right or moral duty, such as it is, is a duty in the interest of society and the public good",* etc.

THE SERVICE LETTER STATUTE OF OKLA-

HOMA UNDER ATTACK HERE WAS PROPER LEGISLATION UNDER THE POLICE POWER OF THE STATE.

This Court has been called upon so frequently to determine as to whether or not given legislation of the state is within its police power, and has written so many opinions defining the scope of that power, that we hesitate to quote from those opinions, or even cite any long array of them.

Be we feel like calling the attention of the Court to the case of *Noble State Bank* v. *C. N. Haskell et al.*, decided at the October Term, 1910, reported in Vol. 219 U. S. Reports, 575 (55 Law Ed. 112), wherein this Court, in discussing the constitutionality of the Oklahoma guaranty law, and whether or not that law deprived the banks affected by it of their property without due process of law, it is said:

> "In answering that question, we must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the bill of rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the constitution of the United States, judges should be slow to read into the latter *a nolumus mutare* as against the law-making power."

We also call the attention of the Court to its de-

cision in *Chicago, B. & Q. R. Co.* v. *Ill. ex rel. Grimwood*, 200 U. S. Reports, 561 (50 Law Ed. 596), where the Court substantially said, regarding the police power, that it embraces regulations designed to promote the public convenience or the general prosperity, as well as those designed to promote the public health, the public morals, or the public safety. And we also call the attention of the Court to its long line of cases citing *Crowley* v. *Christensen*, 137 U. S., 86 (34 Law Ed. 630), wherein the Court affirms the doctrine, substantially, that the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governmental authority of the country essential to the safety, health, peace, good order and morals of the community; and also to the line of cases in this Court holding substantially that the police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest, as shown in *Camfield* v. *United States*, 167 U. S., 18 (42 Law Ed. 260). We also feel that it is unnecessary to call the attention to the fact that this Court has sanctioned the power of the states, under certain limitations, to control the charges and rates for services by public service corporations; has sustained legislation that requires the master to furnish safe appliances and proper working conditions for the servant and many other acts which could be mentioned, which in their result require the master to spend large sums of money which he otherwise would not have to spend, and in which cases, it seems to us, it could be more plausibly argued that such legislation deprives a person of property without due process of law than in such a suit as the one under review, where

no property is taken from the master; and if the giving of a service letter entails expense, or even inconvenience, that the same is trivial and inconsequential, and that therefore, this Court will have no difficulty in coming to the opinion that the legislation under attack here violates no right of the plaintiff in error guaranteed to it by any of the provisions of the constitution of the United States.

When the service letter law, as found in Oklahoma Revised Statutes, 1910, Sec. 3769, is examined, it will be found that the obligation it imposes upon the master is, substantially stated, that when an employee leaves the service of the master, and requests it, the master shall give him a letter setting forth the nature of the service rendered by such employee, and truly stating the cause for which such employee was discharged from, or quit, such service. The remaining parts of this rather lengthy section provide a penalty for failing to do so, and then further provide, in considerable detail, the physical form which the letter shall take, among which is the provision that it shall be upon a plain sheet of white paper; that no printed blank shall be used; that it shall be signed with a pen and black ink, and have affixed the official stamp or seal of the officer issuing the same; that there shall be no figures, words or letters used except such as are plainly essential, and that the letter shall have no picture, imprint, character, design, device, impression or mark upon it. Of course, it is apparent that these minute details as to the form the letter shall take are safeguards against blacklisting; for indeed it would be quite possible for one to give a servant a letter, fair upon its face, that

would entitle him to employment from another master, and yet the letter, should the master issuing it have a secret design to prevent the servant from obtaining new employment, so mark or number it as to fully advise the proposed new master that the one issuing the letter preferred that the new employment be refused. These are merely details, intended to protect the servant against the ill will or secret grudge of the particular officer of the corporation with whom he has been in contact, and who is called upon to issue the letter. So it seems to us that the essential part of the statute to be tested here is merely the provision for the issuance of the letter stating the length, nature and quality of the service rendered.

As has been observed elsewhere, the legislatures of twenty or more States of the Union have felt called upon to make provisions of a similar nature. We have referred to this fact heretofore to show the widespread opinion that the public interest is involved. We do not find where this Court has had under review any of these statutes. A few of the State Supreme Courts have. Plaintiff in error notes that the Supreme Court of the State of Georgia has held such a statute invalid, and that the Supreme Court of the State of Kansas has likewise so held. It is also claimed that Massachusetts has done so, in the case of In Re Opinion of the Justices, 108 N. E., 807, but we think, as shown by plaintiff in error at pages 17 and 18 of its brief, that the question involved here is not the same as was involved in that case. Neither do we think that the Texas cases cited by plaintiff in error have fully and finally settled the question in that State. From our reading of the

opinions cited, it seems to us that the question in that State remains in considerable confusion. Of the States that through their Supreme Courts have held such legislation constitutional, Oklahoma and Missouri can both be cited, and some, at least, of the text writers, especially the more modern ones, seem to be clearly of the opinion that such legislation is valid. In Labatt on Master and Servant, Vo. 5, at Sec. 2014 of the text, we find the following discussion:

> "In some jurisdictions, the common law rule has been modified by statutes applicable either to employers generally, or to employers of a particular class; and there seems to be good reason to anticipate that enactments of this type will be greatly multiplied in coming years. The desirability of thus supplying the deficiencies of the common law cannot be consistently disputed by anyone who is of opinion that it is proper to protect employes by legislation against 'blacklisting',", etc.

And the same author, in discussing these statutes, says, in Vol. 5 Labatt's Master and Servant, Sec. 2031:

> "STATUTES WITH REGARD TO BLACKLISTING.—The present writer has no hesitation in expressing the opinion that the broader considerations of public policy point very decidedly to the conclusion that 'blacklisting' should be greatly restricted, if not entirely prohibited, by legislation, in so far as the practice takes the form of an exchange of circulars or notices between different employers. There is no doubt considerable difficulty in framing provisions which will afford adequate protection to employees, and at the same time not trench unduly upon the privilege of communicating information regarding their character to persons who are interested in ascertaining the truth. (See Sec.

2021 et seq., ante). But it is apprehended that any harm which may result from a moderate limitation of the rights of employers in this respect will be slight in comparison with the evil consequences which are certain to follow if a practice so essentially repugnant to the free institutions of the Anglo-Saxon civilization as that of systematic 'blacklisting' is allowed to remain unregulated. The inevitable effect of such a practice must be the subjection of a constantly increasing number of employees to disabilities and restrictions scarcely less oppressive than those to which servants were formerly subjected in England by statutory provisions long since obsolete, and to which they are still in some measure subjected by the laws of a portion of the countries of Continental Europe. A passport system of this kind has always been found to be productive of serious evils, even when it is worked by public officials; and it must be much more dangerous to leave in the hands of private parties so formidable an instrument of potential tyranny, capable of being used, and, as human nature is constituted, certain to be used, in many instances, as a means of gratifying personal animosity or class hatred.

"These considerations go far to justify the drastic action already taken by those American legislatures who have enacted statutes, of which the general purport is, that any corporation or individual who 'blacklists' an employee, with the intent of preventing him from obtaining employment from any other person, is guilty of a penal offense. One of these enactments, viz: that of Minnesota, has been pronounced constitutional. Two others, viz., those of Georgia and Indiana, have been declared invalid.

"Some of these statutes not only forbid 'blacklisting', but declare it to be unlawful for

two or more employers to combine or confer together for the purpose of preventing any person from procuring employment. In Minnesota it has been held that a person who is prejudiced by a breach of such a provision may recover damages against the employer who violated it. He does not, however, establish a right to recover on the ground of such violation by merely proving that the defendant's interference resulted in his loss of employment. 'Conditions might exist between two employers that an interference to prevent the employment of a particular person would be perfectly justifiable. To constitute an actionable wrong under the statute, therefore, it should appear that the interfering employer was actuated by malice or an evil intent toward the person interfered with * * * not express malice, but such as the law implies in such cases from the fact that the act complained of was unlawful.'

"Statutes of this kind are intended to prevent the wilful and malicious attempts by one person to prevent another from obtaining employment of any kind, and have no reference to the right of a person to object to the employment of another where the other is required to use the objector's property.

"Under the Texas statute providing that where a corporation discharges an employee it must, under penalty, furnish the employee upon his written demand a true statement of the cause of the discharge, the corporation need not enter into a full history of all the circumstances attending the discharge."

In the late case by the Missouri Supreme Court, of *Cheek* v. *Prudential Insurance Co.*, reported in Vol. 192 S. W. Rep., 387, there is a lengthy discussion of the questions we have before us, and inasmuch as we doubt

our ability to discuss the subject so well, we have taken the liberty to quote quite copiously from that opinion:

> "The statute under consideration was enacted in pursuance to the police power of the state, and in no manner discriminates against the respondent; it applies to all corporations doing business in this state. Nor can this statute be declared class legislation. It was said in the case of *State ex. inf.* v. *Standard Oil Co.*, 218 Mo. 1, loc. cit. 369; 116 S. W. 902, 1015, that:
>
> " 'It is not the object or purpose of that provision of the Constitution to prevent legislation which embraces within its provisions all persons or things which naturally and reasonably belong to the same class and similarly situated, and where the statute must operate equally and uniformly upon all such persons or things of that class. *Andrus* v. *Ins. Ass'n.*, 168 Mo. 151 (67 S. W. 582); *Waters-Pierce Oil Co.* v. *State of Texas*, 19 Tex. Civ. App. 14 (44 S. W. 936); *Railroad* v. *Mackey*, 127 U. S. 209 (8 Sup. Ct. 1161, 32 L. Ed. 107); *Barbier* v. *Connolly*, 113 U. S. 31 (5 Sup. Ct. 357, 28 L. Ed. 823); *Railroad* v. *Mathews*, 165 U. S. 25 (17 Sup. Ct. 243, 41 L. Ed. 611); *Plessy* v. *Ferguson*, 163 U. S. 550 (16 Sup. Ct. 1138, 41 L. Ed. 256); *Railroad* v. *Ellis*, 165 U. S. 150 (17 Sup. Ct. 255, 41 L. Ed. 666). The purpose of that provision was to prevent legislation which embraces within its provisions persons or things which affect only a portion of the persons or things which rationally belong to the same class and who are similarly situated. *Railroad* v. *Ellis*, 165 U. S. 150 (17 Sup. Ct. 255, 41 L. Ed. 666).'
>
> "So with this statute, it embraces within its provisions all persons and things which naturally and reasonably belong to the same class and similarly situated, and it operates equally and uni-

formly upon all of them, and is not limited to only a portion of the persons and things which rationally belong to the same class. Similar statutes of Georgia and Kansas have been held unconstitutional and void by the Supreme Court of each of those states. *Wallace* v. *Georgia, et al.*, 94 Ga. 732, 22 S. E. 579; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Brown*, 80 Kan. 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247, 133 Am. St. Rep. 213, 18 Ann. Cas. 346. And counsel for respondent insist that the Georgia case has received the approval of this court in the case of Exparte Harrison 212 Mo. 88, 110 S. W. 709, 16 L. R. A. (N. S.) 950, 126 Am. St. Rep. 557, 15 Ann. Cas. 1. After a careful reading of the last case, we are of the opinion that it does not approve the doctrine of the Georgia case; and we are also of the opinion that said case was not applicable in facts of the Harrison case, supra. The latter was a proceeding by writ of habeas corpus, to release Harrison from custody, who had been arrested and was being prosecuted under an information filed by the prosecuting attorney of Jackson County, Mo., for having published, as Secretary of the Kansas City Civic League, certain reports made by said league, regarding the candidacies of John M. Road and Wm. J. Campbell, candidates for the office of sheriff of Jackson County, in violation of an act of the legislature, approved April 12, 1907 (Laws 1907, p. 261). The petitioners contended that said act was void, in that it violated Section 14, Art. 2 of the Constitution of Missouri, which provides:

" 'That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty.'

"It was conceded that the publication men-

tioned was laudatory of both candidates, and contained nothing which was blasphemous, obscene, seditious, defamatory, or injurious to the reputation of either of said parties. The publication violated said act by omitting to state therein the source of the information on which the report published was founded. Upon that state of facts this court, in that case, properly held the Act of 1907, to be unconstitutional; but, as previously stated, I am unable to see what relevancy the Georgia case had to the Harrison case, yet it must be conceded that the Georgia case is an authority for the support of the contention of counsel for the respondents in this case. But be that as it may, in my opinion that case and the Kansas case are not in line with the spirit of similar statutes nor the spirit of this progressive age, which is to protect and shield the public and wage earner from bodily injury and to remove him from injurious cliques and combinations formed by others to control his right to work and labor for himself and those who are dependent upon him; otherwise, the effect would be to pauperize him and his family, as well as all other wage-earners similarly situated.

"Besides this, in my opinion, the statute in question is a wise exercise of the police power of the state; it affects a class composed of many thousands of people as to whom, if not protected from the evil mentioned, great hardships, injustice and opposition could be perpetrated upon them. The same principles of police regulation lie at the base of this class of contracts that underlies the regulation of almost every other species of contracts negotiated in this state, the validity of which is no longer challenged. This question was presented to the Texas Court of Civil Appeals in the case of *St. Louis S. W. Ry. Co.* v. *Hixon,* 126

S. W. 338, and in discussing a similar statute that Court said:

"'The Statute here under discussion was passed to meet and remedy an evil that had grown up in this state among railway and other corporations to control their employees. It seems that a custom had grown up among railway companies not to employ an applicant for a position until he gave the name of his last employer, and then write to such company for the cause of the applicant's discharge, if he was discharged, or his cause for leaving such former employer. If the information was not satisfactory to the proposed employer, he would refuse to employ the applicant. They could thus prevent the applicant, by failing to give a true reason for his discharge of blacklisting him, from procuring employment in either instance. Even if the statutes construed in the cases cited were in all respects similar to the statute before us, we would not be inclined to follow those decisions. It was to compel the former employer to state the true cause of its employee leaving its service, and to prevent blacklisting, that brought about the passage of this statute. We have statutes in this state more exacting and drastic than the statute under discussion, which are being enforced daily, and no decision of the appellate courts is cited in holding them unconstitutional. * * * No part of the federal or state constitution is violated by this act. It is not ex post facto; does not impair the obligation of contracts; does not authorize searches or seizures of persons or houses; provides for trial in open court, and thereby guarantees due process of law. It gives security of persons and property; does not take away the right of free speech, or right to make, print or publish one's own opinion. It does require, under certain conditions, that an employer shall speak the truth in regard to the ex-employee.'

"The same is true of our statute and it validates no provision of the state or federal constitution.

"In the case mentioned the Supreme Court of Texas granted a writ of error, and the judgment of the court of appeals was reversed, but not upon any constitutional grounds, the court declining to consider the question whether the statute was constitutional. *St. Louis Southwestern R. Co.* v. *Hixon,* 104 Tex. 267, 137 S. W. 343. Later the case of *St. Louis S. W. R. Co.* v. *Griffin* (Tex. Civ. App.) 154 S. W. 583, was decided, in which opinion the court held the blacklisting statute of Texas to be constitutional, and reviewing at length all the cases bearing on the question. The statute under consideration imposes no unjust burden or expense upon the respondent or other corporations doing business in this state. It was designed to protect the public interests as well as the wage-earner, against an injurious custom given birth to and fostered by said corporations.

"That a foreign corporation has no inherent right to exist or to do business in this state is no longer an open question. It derives those rights from the state, impressed with such conditions and burdens as the state may deem proper to impose, and when such a corporation comes into this state to do business, it must conform to the laws of this state, and will not be heard to complain of the unconstitutionality of our police regulations. *Daggs* v. *Orient Ins. Co.,* 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638, and cases cited; *State ex rel. Equitable Life Assurance Society* v. *Vandiver,* 222 Mo. 206, 121 S. W. 45, and cases cited; *Crutcher* v. *Kentucky,* 141 U. S. 47, loc. cit. 59, 11 Sup. Ct. 851, 35 L. Ed. 649. And, as previously stated, the statute under consideration is applicable to all corporations of the state, which

clearly removes it from the objection of class legislation, both state and federal. *State ex rel* v. *Standard Oil Co.*, 218 Mo. 1, loc. cit. 369, 116 S. W. 902.

"Moreover, when a corporation of this state, or one doing business herein, employs a person to work for it, it thereby, by necessary implication at least, agrees with him to give him a letter of clearance when he leaves the company, as provided for by said statute for the reason that said statute becomes a part of every such contract, and, if such a corporation does not want to give such a letter, then it had better not employ such a person to work for it.

"The states of Indiana, Montana, Kentucky, Oklahoma and Ohio have similar statutes to the one under consideration, and this and many other states have kindred statutes governing many classes of contracts. All of this shows the tendency of the legislature of this country regarding the rights of persons to labor untrammeled by any form of trust, combination or conspiracy.

"That a man has a legal right to labor cannot be questioned. Section 4 of the Bill of Rights, among other things, provides, 'that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry.' This provision, of course, includes the right to labor, otherwise there could be no fruits of industry for persons to enjoy. That being true, it must be considered as axiomatic that no one has the legal right, by any means, to deprive a person of the right to labor for whomsoever he will, with the consent of such other; and it is equally true that if a person is wrongfully deprived of that right by another, the latter, both at common law and under the statute, is liable to him for the damages

he sustains by reasons thereof. The legislature was familiar with these well known rights and duties of the employer and employee at the time of the enactment of this statute, and its purpose was both to prevent wrong, if possible, and to repair the injury, if sustained—conformatory of the common law in the latter respect. Such legislation violates no constitutional provision, state or federal, that I know of; but upon the other hand, is highly beneficial and commendable."

And the Supreme Court of Minnesota, in the case of *Joyce* v. *Great Northern Railway* Co., 110 N. W. 975, while not having before it the identical question involved here, discusses the general subject matter so satisfactorily to us that we quote from the body of that opinion the following:

"The violent strife in recent years between employers and employees respecting the rights and obligations of each to the other has brought from the legislatures of many of the states numerous enactments, for the purpose of ameliorating the condition of the employee on the one hand, and protecting the property and property rights of the employer on the other. These the courts have sustained on the broad ground that every citizen is entitled to the protection of the law, and that it is a legitimate exercise of legislative power to prescribe rules defining and establishing the distinctions respecting the rights, obligations and duties of employers and employees as a class. Public attention has repeatedly been called to the alleged wrongful and malicious conduct of employers in interfering with the free exercise of the will of employees in pursuing their calling, particularly in efforts to prevent them from obtaining employment where they may, of which blacklist cases furnish an illustration. On the other hand, the

Reports are full of decisions respecting the wrongful and unlawful acts of employees, through labor unions, in coercing and influencing the action of employers by boycotts and other equally wrongful and unlawful means. The statute under consideration is in line with other similar legislation designed to, in a measure, remedy existing evils, and was undoubtedly intended as a further check on employers, and to declare their acts, insofar as taken for the purpose of preventing laborers from obtaining employment, unlawful."

CASES CITED BY PLAINTIFF IN ERROR.

The case of *Coppage* v. *Kansas*, 236 U. S. 1 quoted from at length by the plaintiff in error, does not seem to us to be authority on the point involved here. In that case the legislation stricken down as unconstitutional plainly interfered with the free right of contract. It made it highly penal and subjected the master to a fine if he made it a condition of the employment that the servant agree not to become a member of a labor union. We also think the case of *Truax et al.* v. *Riack*, 239 U. S. 33, is likewise not in point, for the same reason, for, like the Coppage case, this Court held invalid the statute of Arizona because it discriminated against persons seeking employment because they were aliens, notwithstanding the fact that they were lawfully in the United States; the Court in that case held that such persons, being in the United States lawfully, under its laws were entitled to the equal protection of the law by being permitted to work and thereby earn a livelihood.

The case of *A. T. & S. F. Ry. Co.* v. *Vosburg*, 238

U. S. 56, relied upon by plaintiff in error, likewise does not seem to us to be in point. In that case the legislation required the railway company in certain cases to pay the claimant, if successful, attorney's fees. It did not impose the same obligation on the claimant if he lost the suit. The same may be said of *Gulf C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150. The last mentioned cases relied upon by plaintiff in error may have some bearing on this case, but it seems to us that they represent cases clearly in violation of the Constitution of the United States, and do not, any of them, represent legislation such as is involved here.

CONCLUSION.

We very earnestly believe that this case does not necessarily involve any Federal question, and that, therefore, this Court is under no obligation to pass upon the constitutionality of the legislation in question.

We also believe, however, that if the Court feels that a Federal question is involved, and has been properly presented, then that the legislation in question is valid as a proper exercise of the police power of the State, and that it is not such an arbitrary exercise of that power as would require it to be stricken down.

Respectfully submitted,

Jean H. Everest

Edward S. Vaughn

Phil D. Brewer

Attorneys for Defendant in Error.

520 Liberty Bank Bldg.
Oklahoma City, Okla.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* PERRY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 19. Argued April 20, 1921; restored to docket for reargument June 6, 1921; reargued October 6, 1921.—Decided June 5, 1922.

1. Where an issue upon the constitutionality of a state statute, though not actively litigated in the trial court, is actually decided by the state court of last resort in favor of the statute, its judgment is reviewable here under Jud. Code, § 237, as amended September 6, 1916. P. 551.
2. The law of Oklahoma requiring public service corporations to issue to employees, when discharged from or voluntarily quitting their service, letters setting forth the nature of service rendered by such employees, and its duration, with a true statement of the cause of discharge or leaving, is consistent with due process and the equal protection of the laws. Pp. 555, 556. *Prudential Insurance Co.* v. *Cheek, ante,* 530.

3. Provisions that such letters shall be on plain paper selected by the employee, signed in ink and sealed by the superintendent or manager, and free from superfluous figures, words, designs, etc., are likewise valid. P. 555.

75 Okla. 25, affirmed.

ERROR to a judgment of the Supreme Court of Oklahoma, affirming a judgment for the plaintiff Perry in his action for damages against the railway company.

Mr. C. O. Blake, Mr. W. R. Bleakmore, Mr. John W. Willmott, Mr. R. J. Roberts, Mr. Thomas P. Littlepage and *Mr. Sidney F. Taliaferro,* for plaintiff in error, submitted. *Mr. Raymond A. Tolbert* and *Mr. Roy S. Lewis* also were on the briefs.[1]

Mr. Phil. D. Brewer, with whom *Mr. Edward S. Vaught* and *Mr. Jean H. Everest* were on the briefs, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This writ of error was sued out to test the validity, in view of the due process and equal protection provisions of the Fourteenth Amendment, of the Service Letter Law of Oklahoma (Act of April 24, 1908, Oklahoma Laws 1907–08, p. 516; Revised Laws Oklahoma 1910, § 3769), applicable to public service corporations and the like, in a case that arose under the following circumstances.

Daniel J. Perry, defendant in error, brought suit against Jacob M. Dickinson, then receiver of the Chicago, Rock Island & Pacific Railway Company (the company itself afterwards was substituted in his place while the cause was pending in the Supreme Court of the State). Plaintiff alleged that while in the employ of the company,

[1] At the former hearing the case was argued by *Mr. Blake* on behalf of the plaintiff in error, and submitted by *Messrs. Vaught* and *Everest* for defendant in error.

which operated a railway in Oklahoma and by which he had been employed continuously for a period of years, and while in the performance of his duties as switchman, he received severe personal injuries caused by a defect in a car brake, which either was known or in the exercise of due care by its employees would have become known to the railway company; the latter acknowledged responsibility for his injuries, settled with him through its claim agent on the basis of the company's negligence, furnished him with hospital treatment before and after the settlement; after some months dismissed him from the hospital as able to resume work; then refused to reëmploy him on the ground that he was ineligible by reason of physical incapacity; and after he had unavailingly sought reemployment at intervals during two years, furnished him through its superintendent with a service letter certifying (correctly) that he had been employed upon the company's lines as switchman for a period named, and (contrary to the fact) that he had been dismissed on account of his responsibility in a case of personal injury to himself June 30, 1913, his service being otherwise satisfactory; and he averred that because of this letter he had been unable to secure employment although competent, able and willing.

Defendant, besides a general denial, averred that the statute upon which the action was based was void because it deprived defendant of the due process of law and denied to it the equal protection of the laws guaranteed by the Fourteenth Amendment, and also because it violated a section of the state constitution in denying to defendant freedom of speech, including the right to remain silent. A trial by jury resulted in a verdict and judgment for plaintiff, which on appeal was affirmed by the Supreme Court. *Dickinson* v. *Perry*, 75 Okla. 25.

That court overruled the contention that the proof failed to show that the service letter given to plaintiff

did not truly state the cause of his discharge; then proceeded to discuss the constitutional questions, sustained the act, and affirmed the judgment.

Defendant in error moves to dismiss the writ of error on the ground that the constitutionality of the act was not really at issue; that the trial judge's instructions to the jury show that the only substantial question was whether the statements made in the letter actually given by the defendant were false and derogatory, and whether plaintiff had suffered damage thereby. But since the court of last resort of the State actually dealt with and passed upon the question raised by plaintiff in error as to the validity of the statute upon the ground of its being repugnant to the Constitution of the United States, and decided in favor of its validity, it is clear that, under the first paragraph of § 237, Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726, we have jurisdiction to pass upon the question, and the motion to dismiss must be denied. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 257.

Again, in discussing the merits, defendant in error insists that the federal question is not necessarily involved; that the constitutional objection was waived when the company, instead of refusing to give a letter, of its own volition gave to Perry upon his dismissal a service letter which was false and derogatory, and which caused special damage that was pleaded and proved. At first blush, it seems somewhat strange for the company to aver that it acted under compulsion of a void statute, when what it did was contrary to the command of the statute; it almost looks as if it were merely held in damages for what ordinarily might be called a libel. But the case cannot properly be dealt with upon this ground. The Supreme Court of Oklahoma not only passed upon the question of the constitutionality of the Service Letter Law but deemed it

necessary to pass upon it. So far as can be gathered from its opinion, there was no other legal ground upon which the judgment could be supported. Apparently, under the law of Oklahoma apart from the statute, no legal duty was imposed upon the employer in such a case to speak the truth in a communication made respecting a discharged employee, nor was there other ground of liability for damages in case of its falsity. The statute is the essential foundation upon which the judgment rests, and we cannot find that the objections to its validity have been waived.

The act (Oklahoma Laws 1907–08, p. 516; Revised Laws Oklahoma 1910, § 3769) reads as follows:

"3769. *Corporation to give letter to employee leaving service.* Whenever any employee of any public service corporation, or of a contractor, who works for such corporation, doing business in this State, shall be discharged or voluntarily quits the service of such employer, it shall be the duty of the superintendent or manager, or contractor, upon request of such employee, to issue to such employee a letter setting forth the nature of the service rendered by such employee to such corporation or contractor and the duration thereof, and truly stating the cause for which such employee was discharged from or quit such service; and, if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employee, when so requested, or shall wilfully or negligently refuse or fail to state the facts correctly, such superintendent, manager or contractor shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the county jail for a period of not less than one month and not exceeding one year: Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employee.

No printed blank shall be used, and if such letter be written upon a typewriter, it shall be signed with pen and black ink and immediately beneath such signature shall be affixed the official stamp, or seal, of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters used, upon such piece of paper, except such as are plainly essential, either in the date line, address, the body of the letter or the signature and seal or stamp thereafter, and no such letter shall have any picture, imprint, character, design, device, impression or mark, either in the body thereof or upon the face or back thereof, and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above prescribed."

The Supreme Court (75 Okla. 31), after stating, on familiar grounds, that the legislature itself was the judge of the conditions which warranted legislative enactments, and laws were only to be set aside when they involved such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they might be said to be merely arbitrary and capricious, and hence out of place in a government of laws and not of men, went on to say: "Whether or not the custom still prevails, it appears that at one time it was the rule among railway companies and other corporations to keep a list of employees who were discharged or left the service and to furnish such list to other railway companies and employers. Any reason which might be agreed among employers was sufficient for 'blacklisting' employees, thereby possibly preventing their again securing employment in their accustomed occupation or trade. It was this abuse, among other things, which caused the legislatures of various States to enact laws declaring blacklisting unlawful, and requiring corporations to give a letter to employees discharged or leaving the service, setting forth the reasons

for the discharge of the employee or of his leaving the service and the nature of the service rendered by the employee. . . . [p. 32] The idea of requiring employers to give employees leaving their service a letter showing the character of work performed while in their service is not a new one. The common law recognized a moral obligation resting upon the employers to give a 'character' to servants leaving the employment of their masters, but no legal obligation of this nature existed until laws touching these matters were enacted. . . . [p. 33] There is nothing in the law contested which attempts to prevent a corporation from hiring whomsoever it pleases, or from discharging its employees when it sees fit. Neither is there anything in the law which requires a corporation to give a letter of recommendation to employees discharged or leaving its service. All that is required is a statement of the employer showing the character of services rendered by the employee and the reason for his leaving the service of his employer. It is a certificate which, when the facts are favorable to the employee, may assist him in securing other work along the line of his trade, and is a certificate to which he feels that in justice he is entitled. . . . There is nothing unusual or revolutionary in requiring the employer to give a certificate to the employee leaving his service showing the time he has been employed and the character of service rendered. . . . The employee who perhaps has devoted years of his life to a particular trade, when relinquishing employment, is without evidence to present in another locality or to another employer unless he has some certificate showing the term and character of his previous employment."

The court proceeded to say that the legislation was a warranted and lawful exercise of the police power of the State, that the contention that it involved a private and not a public matter, in that only the individual employee and the individual employer were concerned, was a pure

assumption that failed to recognize existing conditions; that the welfare of employees affected that of entire communities and the whole public. The decision of the Supreme Court of Missouri in *Cheek* v. *Prudential Insurance Co.*, 192 S. W. 387, 392, affirmed this day in our No. 149, *ante*, 530, was cited with approval and the statute attacked held not to deny to defendant due process of law nor to constitute an illegal infringement upon the right of contract.

The contention that the statute was a denial and abridgment of the right of free speech was overruled upon the ground that the right did not exist under the state constitution in the absolute form in which it was asserted. The decisions by the supreme courts of Georgia, Kansas and Texas in *Wallace* v. *Georgia, C. & N. Ry. Co.*, 94 Ga. 732; *Atchison, etc. Ry. Co.* v. *Brown*, 80 Kans. 312; and *St. Louis Southwestern Ry. Co.* v. *Griffin*, 106 Tex. 477, were disapproved.

Except for the particular requirements contained in the proviso, the statute here in question does not differ substantially from the Missouri statute this day sustained in *Prudential Insurance Co.* v. *Cheek*, *ante*, 530, and may be sustained as against the contention that it is inconsistent with the guaranty of " due process of law " for the reasons set forth in the opinion in that case.

The proviso requires that the service letter shall be written entirely upon a plain sheet of white paper to be selected by the employee, no printed blank to be used and the letter if written upon typewriter to be signed with pen and black ink, and immediately beneath the signature an official stamp or seal to be affixed in an upright position. No figures, words or letters to be used, except such as are plainly essential, either in the date line, the address, the body of the letter, or the signature and seal or stamp; and no picture, imprint, character, design, device, impression or mark to be either in the body or upon the face or back of the letter. Manifestly these

provisions are designed to insure the authenticity of the document, to prevent fabrication and alteration, and to make sure that it shall not only be fair and plain upon its face but shall exclude any cryptic meaning. They are contrived to prevent the purpose of the act from being set at naught by the giving of fraudulent service letters, which while bearing one meaning to the employee might bear another and very different one to the prospective employer to whom they might be presented. The act being valid in its main purpose, these provisions intended to carry it into effect, must be sustained. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 570; *Second Employers' Liability Cases*, 223 U. S. 1, 52.

The contention that the Service Letter Law denies to plaintiff in error the equal protection of the laws is rested upon the fact that it is made to apply to public service corporations (and contractors working for them), to the exclusion of other corporations, individuals, and partnerships said to employ labor under similar circumstances. This is described as arbitrary classification. We are not advised of the precise reasons why the legislature chose to put the policy of this statute into effect as to public service corporations, without going further; nor is it worth while to inquire. It may have been that the public had a greater interest in the personnel of the public service corporations, or that the legislature deemed it expedient to begin with them as an experiment—or any one of a number of other reasons. It was peculiarly a matter for the legislature to decide, and not the least substantial ground is present for believing they acted arbitrarily. We feel safe in relying upon the general presumption that they "knew what they were about." *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157–158, and cases cited.

Judgment affirmed.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.